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No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

E. MARIE HOLDEN,

Petitioner,

—v.—

OWENS-ILLINOIS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Should the court grant certiorari to resolve a conflict between the courts of appeals as to whether an employee must prove that her employer has in fact engaged in employment discrimination in order to prevail on a claim that she was discharged because she had opposed practices made illegal by Title VII of the Civil Rights Act of 1964?

2. May an employee be discharged because she has opposed employment practices that violate her employer's obligations as a federal contractor, imposed by Executive Order 11246 and because she has urged that her employer obey the Executive Order?

3. May an employee whose duties are to ensure that her company is following federal anti-discrimination law be discharged because of her "vigorous"

opposition to practices she believed violated those laws?

4. Did the court of appeals err when it engaged in de novo fact finding rather than remanding the case to the district court?

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No. 86-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

E. MARIE HOLDEN,

Petitioner,

- v -

OWENS-ILLINOIS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner E. Marie Holden prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on June 18, 1986, reversing the decision of the United States District Court for the

Northern District of Ohio.

OPINIONS BELOW

The decision of the court of appeals of June 18, 1986 is reported at 793 F.2d 745 and is set forth in the Appendix at pages 1a-19a. The district court's Opinion and Order of July 25, 1984, is not reported, and is set forth in the Appendix at pages 20a-53a. Other decisions and orders of the district court, also unreported, dated March 29, 1985, April 24, 1985, May 8, 1985, and August 8, 1986 (order on remand), are set forth in the Appendix at pages 54a-70a, 71a-76a, 77a-79a, and 80a-81a, respectively.

JURISDICTION

The judgment of the Court of Appeals reversing the decision of the district court was entered on June 18, 1986. On September 8, 1986, Justice

O'Connor granted an extension of time in which to file the Petition for Writ of Certiorari to and including October 16, 1986. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

This case involves the following statutes, regulations and rules, the pertinent texts of which are set out in the Appendix at pp. 82a-89a.

42 U.S.C. §2000e-2(a), Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended;

42 U.S.C. §2000e-3(a), Section 704(a) of Title VII, as amended;

Executive Order 11246;

41 C.F.R. §60-1.32;

41 C.F.R. § 60-2.22;

Rule 52(a) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner E. Marie Holden, a black woman, commenced this action in the United States District Court for the Northern District of Illinois, Western Division, on September 2, 1976, after receipt of a right-to-sue letter from the Equal Employment Opportunity Commission.[1] App. 20a. On February 15, 1977, petitioner filed an amended complaint alleging that respondent employer had discharged her because she had opposed and had sought to have corrected violations of Title VII of the Civil Rights Act of 1972 and of Executive Order 11246, in violation

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[1] The original complaint, which was based on diversity of citizenship, asserted a claim under state law for "fraudulent representation." The district court found against petitioner on the state law claim and that holding was affirmed on appeal. No issues are raised here relating to the state claim.

of Section 704(a) of Title VII, 42 U.S.C. §2000e-3(a).

The case was tried without a jury in September and October 1981. App. 20a; 24a. On July 25, 1984, the district court issued an Opinion and order finding as a matter of fact that plaintiff was discharged because she opposed practices she believed violated Title VII. The district court therefore awarded her backpay, reinstatement, and attorneys' fees (App. 42a-53a), and subsequently entered a monetary judgment against the respondent. App. 68a-70a; 71a-76a; 77a-79a.

Respondent appealed the district court's decision, and the court of appeals, although it did not find any of the district court's findings of fact to be clearly erroneous, reversed the holding that plaintiff had been discharged because

she had engaged in activities protected by §704(a). The court of appeals remanded the case to the district court with instructions to dismiss petitioner's complaint (App. 19a; 80a-81a), thus occasioning this petition for a writ of certiorari.

B. Statement of Facts

In ruling in favor of petitioner, the district court made a number of findings of fact that it summarized as follows:

> There is no doubt in the Court's mind that at the time the defendant employed the plaintiff, its employment practices were in many respects discriminatory, especially as to race, but also as to gender. It had been following the common practice of window-dressing by token employment of minority individuals, rather than seriously trying to change its methods and to remedy the results of its past discriminatory actions. When the plaintiff, perhaps with more zeal than good judgment, moved aggressively to try to get action, she was summarily discharged. (App. 31a-32a.)

* * *

> Upon the plaintiff's second claim, that of retaliatory discharge forbidden by 42 U.S.C. §2000e-3, the Court concludes that the plaintiff was in fact discharged because she was strenuously seeking to bring the defendant into full compliance with its duty not to discriminate in employment. (App. 34a-35a.)
>
> * * *
>
> As noted above, plaintiff was discharged because she vigorously opposed what she perceived to be violations of Title VII. There is no doubt that her perceptions were based in fact. This Court has little difficulty concluding that her conduct was protected conduct within the meaning of Title VII, and has even less difficulty concluding that but for her willingness and attempts to do her job effectively she would not have been discharged. (App. 39a.)

These findings as to the ultimate issue before the court were fully supported by the evidence introduced at trial.

Marie Holden was recruited in August, 1975, by Respondent Owens-Illinois, Inc. to serve as Manager-Equal Opportunity Affirmative Action Programs at

Respondent's corporate headquarters in Toledo, Ohio. [2] Owens-Illinois' Manager-Equal Opportunity Affirmative Action Programs was responsible for "the development of Affirmative Action Programs that w[ould] ensure equal employment opportunities as required by local, State and Federal Law."[3] Ms. Holden, a college graduate and an equal employment opportunity and affirmative action program professional for over 15 years, began her employment with Respondent on October 1, 1975. [4]

Ms. Holden testified that her

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[2]Complaint, Holden v. Owens-Illinois, Inc., No. C76-442 þ1,4 (N.D. Oh. filed Sept. 2, 1976); Answer, Holden v. Owens-Illinois, Inc., No. C76-442 þ1, 4 (N.D. Oh. filed Sept. 22, 1976). Dec. of Dist. Ct., App. 24a.

[3]Defendant's Exhibit "O".

[4]Id.

predecessor in the position of Manager-Equal Opportunity, John Gregory, warned her after she accepted the position with Owens-Illinois, that Owens-Illinois "was not committed to Affirmative Action or EEO, and that they had done just about nothing toward the advancement of such purposes." [5] Ms. Holden quickly learned for herself that Mr. Gregory's assessment was painfully accurate. Approximately six weeks after she began her employment with Respondent, on November 11, 1975, Ms. Holden was fired. [6]

When Ms. Holden, a management-level employee, reported for work on October 1, she was given "a makeshift place to work . . . in the middle of the

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[5]Testimony of E.M. Holden, Trial Transcript (hereafter, "Tr.") 89.

[6]Defendant's Exhibit "P".

floor with the clanking of typewriters all around."[7] When she asked to see the corporate headquarters' Affirmative Action Plan on her first day of work, she was told that none existed.[8] Instead, Ms. Holden was shown the Affirmative Action Plans for the field facilities, and was told that those plans "[we]re all no good . . . and . . . it was [her] job . . . to take every one of them and make them . . . passable."[9] Ms. Holden was still concerned that the corporate headquarters did not have an affirmative action plan, however, and she thus informed her supervisor, Philip Anthony, that she could develop one. She testified that Mr.

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[7]Testimony of E.M. Holden, Tr. 95. Dec. of District. Ct., App. at 27a.

[8]Testimony of E.M. Holden, Tr. 96.

[9]Testimony of E.M. Holden, Tr. 105, 108, 109.

Anthony replied that she should "[t]read softly . . . [and should not] poke [he]r nose where it doesn't belong."[10]

Soon after Ms. Holden began her employment with respondent she was approached by a number of female and minority employees who learned about her arrival from a memorandum circulated by the Owens-Illinois management. These employees told Ms. Holden that they believed that women and minority employees were discriminated against by Respondent. When Ms. Holden informed John Chadwell, respondent's Director of Human Resources, about the workers' complaints Chadwell said that he "wasn't going to be involved in it".[11]

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[10]Testimony of E.M. Holden, Tr. 110.

[11] Testimony of E.M. Holden, Tr. 136-138. Mr. Chadwell testified that he had no recollection of this discussion. Tr. 555.

Immediately prior to Ms. Holden's termination, she was sent by her supervisor to respondent's Shreveport, Louisiana facility to "fix" their Affirmative Action Plan.[12] Ms. Holden testified that she was warned by Mr. Anthony to "be prepared for whatever [she] found there because they were afraid to have me come. They did not want [her] there, and . . . were going to do everything they could to prevent [her] getting the job done."[13]

The district court found that

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[12] Testimony of E.M. Holden, Tr. 147. In fact, according to Mr. Larry Joe Stump, Industrial Relations Manager for the Shreveport facility, there was no Affirmative Action Plan for the facility when Ms. Holden was sent on the Shreveport assignment. Testimony of L.J. Stump, Tr. 494.

[13] Testimony of E.M. Holden, Tr. 147. See Decision of District Court, App. 28a-30a.

the Shreveport plant manager "was blatantly discriminatory in his treatment of the plaintiff":

> She was not given any proper place to work. Her attempts to get information she needed to design plans was withheld. She was not permitted to interview specific employees. Although the plant manager always addressed his white female secretary formally by her last name, he addressed the plaintiff by her first name. Such condescension is a clear sign of contemptuous and discriminatory attitude. He did not keep appointments with plaintiff, and let her cool her heels in his waiting room for long periods of time when she wanted to talk to him. There was some evidence that other visitors from company headquarters were given "red-carpet" treatment when they came to Shreveport. The plaintiff certainly got no such treatment.

(App. 28a-29a.)

The district court further found that plaintiff's treatment at the Shreveport plant and her attempts to bring the situation there to the attention of the company's management were the events that precipitated her being fired. (App.

30a-31a.)

It was the totality of plaintiffs' experiences and treatment that led to the district court's ultimate finding that the reason for her discharge was her vigorous attempts to get her employer to comply with the laws against discrimination. App. 31a-32a; 37a-39a. Thus, the trial court considered each of the other alleged reasons advanced by respondent for terminating plaintiff and expressly rejected each one on the ground it was not credible. [14]

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[14] Defendants argued that plaintiff's omission of her prior employment history would have been grounds for her termination. The district court found that "The Court has no doubt that the defendant would have employed the plaintiff exactly as it did if it had been aware of the plaintiff's loss of the particular previous employment." App. 24a-25a. Further, the trial court found the defendant's attempts to explain away the defendant's failure to assist and support plaintiff unpersuasive. App. 26a-28a. Finally, the Court dismissed defendant's argument that plaintiff was

C. The Decision of the Court of Appeals.

As noted above, the court of appeals did not hold that any of the findings of fact of the district court were clearly erroneous. Rather, it reversed based on a series of legal propositions and by its own de novo review of the evidence.

1. The Sixth Circuit held that in order for a plaintiff to succeed in a claim that she was discharged for opposing practices made illegal by Title VII, there must be evidence, or a finding, that the employer had in fact violated the statute in specific ways. App. 6a; 8a-10a; 9a, n.4.

2. The court narrowly interpreted section 704 as only protecting

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terminated because of any conflict with her superiors or because of the manner in which she carried out her duties. App. 40a-42a.

employees who are discriminated against for opposing practices that violate Title VII itself. Since it concluded there were no such practices shown, petitioner was discharged because she attempted to bring her employer into compliance with Executive Order 11246, not with Title VII. Therefore, the appellate court agreed with her employer's contention that it was free to discharge an employee because "she aggressively and zealously sought to implement an affirmative action plan which would comply with Executive Order 11,246," since such actions would "not constitute protected conduct." App. 7a. The appellate court held that the district court therefore erred "in treating plaintiff's attempts to implement an affirmative action program which would comply with Executive Order No. 11,246 as protected conduct under the 'opposition

clause'." App. 8a.

3. The court further held that because petitioner was not a compliance officer, i.e., her duties did not encompass the handling of employee complaints, she could be discharged for bringing such complaints to management's attention or urging that they be resolved. App. 16a.

4. The court conducted a de novo review of the evidence and held that petitioner's conduct had "disabled [her] from continuing to work with company executives" (App. 16a-17a) despite the district court's findings to the contrary.[15]

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[15]The district court had examined plaintiff's conduct and made the following findings:

> [T]he plaintiff was trying conscientiously to get the defendant to mend its ways, and to be conciliatory with employees who had filed or were likely to file complaints against it. This was the

REASONS FOR GRANTING THE WRIT

Introduction

This case involves the "opposition clause" component of the protections set out in Section 704(a) of Title VII of the Civil Rights Act of 1964. The section protects both employees who have been discriminated against because they have filed formal complaints alleging discrimination, and employees who have been discriminated against because they have "opposed any practice made an

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> ultimate purpose of plaintiff's employment, and far from being opposed to the defendant's interests, was strongly supportive of them. True, the plaintiff did herself file an EEOC complaint against the defendant a day or so before her employment was terminated, but at the time she did so, for all practice purposes she had been deprived by the defendant of any capability of advancing its real interests. . . .

App. 41a-42a.

unlawful employment practice by this Title."

The district court upheld petitioner Marie Holden's claim that she was discharged because she vigorously voiced her opposition to practices of her employer that "she perceived to be violations of Title VII". App. 39a. The district court further held that "there was no doubt that her perceptions were based in fact," (id.) because there was similarly "no doubt in the Court's mind that at the time the defendant employed the plaintiff its employment practices were in many respects discriminatory, especially as to race." App. 31a.

The court of appeals rejected the holding of the district court, and overruled its findings of fact without holding them clearly erroneous, based on a number of rulings construing the meaning

and scope of §704. First, it held that the plaintiff-employee must demonstrate that the employer in fact had violated Title VII. The court of appeals noted that the district court "did not make any specific findings regarding the violations of Title VII that plaintiff 'opposed.'" App. 6a. Therefore, the appellate court concluded, "the district court did not identify any conduct of defendant which violated Title VII". App. 8a. In discussing one of the specific incidents that plaintiff complained of the court of appeals further noted that "there was no evidence" that the concentration of minorities in a particular job category violated Title VII. App. 9a, n.4. Instead, the court concluded that since there was no evidence of actual violations of Title VII, plaintiff was discharged because she attempted to implement an

affirmative action plan that would comply with Executive Order No. 11246.

Second, and as a corollary reason, the court held that plaintiff's alleged failure to cite Title VII to her employer and her reliance instead on provisions of Executive Order 11246 was fatal to her case, even though both prohibit precisely the same conduct--discrimination on the basis of race and sex.

Third, the court of appeals held that the employer-defendant was free to discharge the employee because she had urged that the remedy of effective affirmative action plans be used to correct the conditions of employment she identified.

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS BETWEEN THE COURTS OF APPEALS WITH REGARD TO THE MEANING AND SCOPE OF SECTION 704 OF TITLE VII.

A. The Decision Below Conflicts With Those of Other Courts of Appeals with Regard to the Standards for Establishing A Violation of Section 704.

The court of appeals' threshold holding that because there was no proof of an actual violation of Title VII, petitioner's discharge did not violate Section 704, is in square conflict with decisions of the Fifth,[16] Seventh,[17] Eighth,[18] Ninth,[19] Tenth,[20] and District

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[16] Payne v. McLemore's Wholesale and Retail Stores, 654 F.2d 1130 (5th Cir. 1981).

[17] Berg v. La Crosse Cooler Co., 612 F.2d 1041 (7th Cir. 1980); Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179 (7th Cir. 1982).

[18] Sisco v. J.S. Alberici Construction Co., 655 F.2d 146 (8th Cir. 1981).

of Columbia Circuits.[21]

The issue presented by this case, and the decisions it conflicts with, is the standard to which an employee is to be held when challenging a discharge under the opposition clause. The possible standards range from the one adopted by the appellate court here, viz., there must be a demonstration that the employer in fact discriminated; to a standard that requires the employee to have an "conscientiously held" if mistaken belief that discriminatory practices existed; to a requirement that the employee had a "reasonable" belief of discriminatory

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[19]Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978); Gifford v. Atchison, T. & S.F. Ry., 685 F.2d 1149 (9th Cir. 1982).

[20]Love v. Re/Max of America Inc.,738 F.2d 383 (10th Cir. 1984).

[21]Parker v. Baltimore and Ohio Railroad Co., 652 F.2d 1012 (D.C. Cir. 1981).

employer behavior. See Monteiro v. Poole Silver Co., 615 F.2d 4, 8 (1st Cir. 1980).

The issue is of crucial importance to the effectiveness of §704, since if an employee who opposes what she reasonably believes to be discrimination does so at her peril unless she can later prove discrimination in fact, the remedial purposes of Title VII will be substantially thwarted. Thus, with the exception of the court below in this case, the appellate courts reaching the issue have held that an employee need only demonstrate that she had a "reasonable belief" that the practice opposed was discriminatory.

For example, in Berg v. La Crosse Cooler Company, 612 F.2d 1041 (7th Cir. 1980), the Seventh Circuit held that an employee could not be discharged for voicing the mistaken belief that Title VII

prohibited the denial of disability benefits based on pregnancy. In Berg, the plaintiff expressed her belief at the time when this Court held, in General Electric Company v. Gilbert, 429 U.S. 125 (1976), that such a denial was not a "practice made an unlawful employment practice" by Title VII. The Seventh Circuit held that because a plaintiff entertained a reasonable belief that the defendant's practices violated Title VII, it would be directly contrary to the policy concerns embodied in Section 704 to permit her discharge for the expression of that belief. 612 F.2d at 1045.

Prior to Berg the Court of Appeals for the Ninth Circuit reached the same conclusion in Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978). The court noted that the protection of Section 704 "could be said

to be limited to cases where the employer has in fact engaged in an unlawful employment practice." The court rejected such a "narrow interpretation" because it not only would "chill the legitimate assertion of employee rights under Title VII, but would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances." 588 F.2d at 695.

The rationale of Berg and Sias has been adopted by the Fifth Circuit in Payne v. McLemore's Wholesale and Retail Stores, 654 F.2d 1130, 1137-1141, 1143-44 (5th Cir. 1981), by the Eighth Circuit in Sisco v. J.S. Alberici Construction Company, 655 F.2d 146, 150 (8th Cir. 1981), and the District of Columbia Circuit in Parker v. Baltimore and Ohio Railroad Co., 652 F.2d 1012, 1019-20 (D.C. Cir. 1981). Indeed, in Parker the court

held that a white male employee's good faith and reasonable belief that an affirmative action plan violated his rights under Title VII would insulate him from discharge even if his belief was not well founded.[22]

In this case the district court made a square factual finding that petitioner's belief that her employer had engaged in discriminatory practices that violated Title VII was not only reasonable but, indeed, was well founded. The court of appeals did not overrule that finding as clearly erroneous but reversed on the legal theory that such a belief did not insulate an employee from discharge unless there was evidence of an actual violation of Title VII. That holding is in clear

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[22]The Tenth Circuit has stated the standard as whether plaintiff has asserted her Title VII rights "in good faith." Love v. Re/Max of America, Inc., 738 F.2d at 386.

conflict with the holdings of six other courts of appeals and because of the importance of the question to the enforcement of Title VII it should be reviewed by this Court.

B. The Court of Appeals' Narrow Interpretation of the Scope of Section 704 Is Inconsistent with Decisions of Other Circuits.

The court of appeals held that an employee's actions seeking to implement an affirmative action plan that would comply with Executive Order 11246 do not constitute protected activity under Section 704(a), the anti-retaliation clause of Title VII. This narrow application of Section 704(a) is inconsistent with rulings of courts that have extended protection of Section 704(a) to employees who opposed practices that were not employment matters covered by Title VII, or who filed complaints

alleging discrimination with federal agencies that had contracted with he employer.

Thus, In Smith v. Singer Co., 650 F.2d 214 (9th Cir. 1981), the court of appeals held that a company's equal employment opportunity officer was protected by §704(a) against retaliation for the act of filing a complaint with the federal Office of Federal Contract Compliance Programs, although it further held that under the facts of the case, the plaintiff's discharge was justified. In Wrighten v. Metropolitan Hospitals, Inc., 726 F. 2d 1346, 1353-57 (9th Cir. 1984), the same court held that a black nurse who complained about inadequate care for black patients was protected by §704 from being discharged. And the Third Circuit has held that an employee was protected by §704(a) if he was discharged for complaining of

discrimination to the United States Department of Housing and Urban Development, which provided the funding for the project involved. Hicks v. ABT Assoc., Inc. 572 F.2d 960 (3rd Cir. 1978). Accord Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978). Analogously, in London v. Coopers & Lybrand, 644 F.2d 811, 818-19 (9th Cir. 1981) the court held that the rights encompassed by §704 can be enforced in an action under 42 U.S.C. §1981. Accord Pinkard v. Pullman-Standard, 678 F.2d 1211, 1229, n. 15 (5th Cir. 1982); Setser v. Novack Inv. Co., 638 F.2d 1137 (8th Cir. 1981).[23]

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[23]See also Choudhury v. Polytechnic Institute of New York, 735 F.2d 38 (2d Cir. 1984) (42 U.S.C. §1981 prohibits retaliation for filing a claim for relief under that statute); accord DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 312 (2d Cir. 1975), modified on other grounds, 520 F.2d 409 (2d Cir. 1975); Goff v. Continental Oil Company, 678 F.2d 593 (5th

II.

THIS CASE PRESENTS IMPORTANT QUESTIONS CONCERNING THE SCOPE OF SECTION 704(A) OF TITLE VII THAT HAVE NOT BEEN ADDRESSED BY THIS COURT.

The holding of the court of appeals, that §704(a) does not protect opposing actions that violate Executive Order 11246 and that, therefore, an employer is free to discharge an employee who attempts to bring about voluntary compliance with the Order, undermines an essential policy of the anti-discrimination laws.

A. The Scope of Section 704(a) Is An Issue of National Importance.

Central to the effective enforcement of Title VII of the Civil Rights Act of 1964, as well as other statutes and provisions against unlawful discrimination in employment, is the role of private

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Cir. 1982); Greenwood v. Ross, 778 F.2d 448, 455 (8th Cir. 1985); Sisco v. J.S. Alberici Const. Co., 655 F.2d 146, 150 (8th Cir. 1981).

individuals who are employees of discriminating employers. As this Court has noted, under the statutory scheme the enforcement of the Act depends on the initiative of such employees. E.g., Love v. Pullman Co., 404 U.S. 522 (1972). Therefore, Congress has provided, as an essential part of the regulatory scheme, that employees will be free from retaliation because they exercise their right to bring complaints. [24]

As this Court has also repeatedly

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[24] In this respect, Title VII parallels the Fair Labor Standards Act (29 U.S.C. §215(a)(3)); the National Labor Relations Act (29 U.S.C. §158); and the Occupational Safety and Health Act (29 U.S.C. §§660). See also 42 U.S.C. §5851(a) (Emergency Reorganization Act of 1974), and 41 C.F.R. §60-250.51 and 60-741.51 (regulations protecting veterans and handicapped workers under the Rehabilitation and Veterans Assistance Acts). This Court has interpreted the protections of the anti-retaliation provision of the NLRA broadly. NLRB v. Scrivener, 405 U.S. 117, 121-22 (1972), and cases there cited.

held, Title VII depends first on voluntary compliance with its provisions and on the conciliation of disputes short of formal complaints and litigation. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Steelworkers v. Weber, 443 U.S. 193, 203-204 (1979); Firefighters v. Cleveland, 478 U.S. ___, 92 L.Ed.2d 405, 419 (1986). Similarly, Executive Order 11246 provides that federal contracting agencies must make reasonable efforts to secure compliance by means of conference, conciliation, mediation, and persuasion. Exec. Order No. 11246, §209(b). Obviously, if an employer is unaware of or indifferent to practices that may constitute violations of the Act there will be no voluntary action to comply.

Section 704(a) is thus vitally important to the carrying out of these goals. Employees must feel free to bring

perceived violations to their employer's attention without fear of retaliation or other discriminatory acts because they have taken the initiative to secure obedience to the law. Thus, the appellate court's ruling conflicts with the clear intent of Congress when passing the Civil Rights Act of 1964, since the central purpose of Section 704(a) of the 'opposition clause' is to encourage and facilitate the enforcement of civil rights by permitting employees to vindicate their rights without fearing reprisal.

The question of the scope and meaning of Section 704 has resulted in extensive litigation in the lower courts [25] but has

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[25]In addition to the cases cited above in Part I see, e.g., Hochstadt v. Worcester Foundation, 545 F.2d 222 (1st Cir. 1976); Silver v. KCA, Inc., 586 F.2d 138 (9th Cir. 1978); EEOC v. St. Anne's Hospital, 664 F.2d 128 (7th Cir. 1981); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235 (3rd Cir. 1978), vacated and remanded on other grounds, 442

only been tangentially addressed by this Court.[26] As shown in Part I above, there is a dispute among the lower courts both as to the scope of the protections of the statute and the burden an employee who complains of retaliation must bear in order to secure those protections.[27] The

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U.S. 366 (1979); Balderas v. La Casita Farms, Inc., 500 F.2d 195 (5th Cir. 1974); McCluney v. Joseph Schlitz Brewing Co., 728 F.2d 924 (7th Cir. 1984); De Anda v. St. Joseph Hosp'l, 671 F.2d 850 (5th Cir. 1982); Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179 (7th Cir. 1982); EEOC v. Crown Zellerbach Corp., 720 F.2d 1008 (9th Cir. 1983); Gifford v. Atcheson, T. & S.F. Ry., 685 F.2d 1149 (9th Cir. 1982). See generally Schlei & Grossman, Employment Discrimination Law, pp. 533-569 (2nd Ed. 1983).

[26]See Emporium Capwell Co. v. Western Addition Comm. Organ., 420 U.S. 50 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972); Great American Federal S. & L. Assn. v. Novotny, 442 U.S. 366 (1979); cf. Connecticut v. Teal, 457 U.S. 440, 454 (1982)

[27]As noted by a leading treatise, "There has been considerable disagreement over the scope of the protection afforded by the opposition clause." Schlei and Grossman, Employment Discrimination Law,

uncertainty of the law can only result in employees being uncertain and fearful of what they may or may not do.

We have demonstrated that the petitioner here in fact opposed activities that she perceived to violate Title VII. Even accepting the court of appeals' conclusion that her opposition was related to the employer's failure to comply with the obligations under Executive Order 11246, the case raises important questions as to whether such opposition also gives rise to the right to be free of retaliatory actions.

B. The Decision of The Court Below Will Necessarily Adversely Impact on The Ability of The Office of Federal Contract Compliance to Achieve Its Goals of Ending Discrimination And Bringing about Effective Affirmative Action Programs.

Contracts entered into with the

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p. 542 (2nd Ed. 1983).

federal government are governed by Executive Order 11246 and the guidelines set out in 41 C.F.R. Parts 60-1 and 60-2. The guidelines require contracting companies not only to refrain from discriminatory actions (E.O. 11246, §202; App. p. 83a) and to develop affirmative action programs that will ensure true equality of opportunity for all of its employees (id.), but also prohibit the taking of any retaliatory actions against employees who attempt to bring about compliance with the Executive Order. (41 C.F.R. §60-1.32; App. pp. 84a-85a.)

One of the requirements under the guidelines is that a responsible company official be appointed as director or manager of company equal opportunity programs guidelines and that the director be given the necessary staffing to carry out his or her duties. (41 C.F.R. §§60-

2.22(a); App. p. 85a.) Petitioner here was appointed to one of the two top staff positions under the respondent company's Director of Equal Opportunity Programs. Her responsibilities were to assist the director in, inter alia, "developing affirmative action programs" (41 C.F.R. §60-2.22(a)(1); App. 85a); "assisting in the identification of problem areas" (§60-2.2(a)(2); App. 85a); "assisting line management in arriving at solutions to problems" (§60-2.22(a)(3); App. 86a); "designing . . . systems that will . . . indicate need for remedial action", (§60-2.2(a)(4); App. 86a); and serving "as liaison between the contractor and . . . organizations . . . concerned with employment opportunities of minorities and women" (§60-2.22(a)(6); App. 86a).

It is clear from the findings of the district court that it was because

petitioner was attempting to carry out effectively the precise duties listed in the Department of Labor guidelines that governed her job that she was fired. Thus, she identified a number of problem areas to management (App. 31a-32a), attempted to develop meaningful affirmative action plans (App. 28a), and attempted to work with line management in the Shreveport plan to solve the severe problems there (App. 29a-31a).

The court of appeals did not dispute any of the district court's holdings. Nevertheless, by reading §704(a) in the narrowest possible way, it held that it was permissible and unchallengeable to discharge petitioner <u>because</u> she was attempting to obtain compliance with the Executive Order rather than, as it interpreted the facts, Title VII itself.

The Sixth Circuit's holding simply ignores the substantial overlap between Title VII and Executive Order 11246, and disregards the essential similarity of the goals which both were enacted to achieve.[28] The United States House of Representatives, in a report accompanying the Equal Employment Opportunity Act of 1972, observed that "the contract compliance program and the Title VII program . . . are addressed to the same basic mission -- the elimination

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[28]Thus, 42 U.S.C. §2000e-2(a) requires employers not to "discriminate against any individual. . . because of such individual's race, color, religion, sex, or national origin . . .," and E.O. 11246 requires each federal contractor to agree not to "discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin."

Similarly, both Title VII, in §704(a), and the guidelines implementing the Executive Order, in 41 C.F.R. §60-1.32, prohibit adverse actions against a person who opposes illegal acts.

of discrimination in employment . . . ., Title VII and the Executive Order 11246 are addressed to the same problem--identifying and remedying employment discrimination . . . . Affirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination." H.R. Rep. No.92-238, 15-16 (92nd Cong., 1st Sess., 1971).

Thus, the decision below can have only the gravest consequences for the effectiveness of the policies of the United States. As we have noted, there have been a large number of cases involving claims under §704(a),[29] and a significant proportion of those cases have involved persons in positions comparable

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[29]See, n. 25, supra, and accompanying text.

to that of petitioner Holden, i.e., employees whose duties relate to the enforcement of and compliance with the federal laws against discrimination. [30]

If, as the court below essentially holds, a person holding an EEO officer's job does her job at her peril

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[30] See, e.g., Pendleton v. Rumsfeld, 628 F.2d 102 (D.C. Cir. 1980); Smith v. Secretary of the Navy, 659 F.2d 1113 (D.C. Cir. 1981); Smith v. Singer Co., 650 F.2d 214 (9th Cir. 1981); Jones v. Flagship International, 793 F.2d 714 (5th Cir. 1986); Hamm v. Board of Regents, 708 F.2d 647 (11th Cir. 1983), reh'g and reh'g en banc denied, 715 F.2d 580 (11th Cir. 1983); St. John v. Employment Development Dep't., 642 F.2d 273 (9th Cir. 1981); Whatley v. Metropolitan Atlanta Rapid Transit Authority, 632 F.2d 1325 (5th Cir. 1981); Thompson v. Int'l Assoc. of Machinists & Aerospace Workers, 38 F.E.P. Cases 894 (D.D.C. 1985); Burston v. Virginia Dep't. of Computer Services, 35 F.E.P. Cases 1825 (E.D. Va. 1984); Ramon v. Smith, 34 F.E.P. Cases 404 (S.D. Tex. 1984); Norton v. Vartanian, 31 F.E.P. Cases 1259 (D. Mass. 1983). See also EEOC v. Anchor Hocking Corp., 666 F.2d 1037 (6th Cir. 1981). See generally Schlei & Grossman, Employment Discrimination Law, pp. 553-54 (2d ed. 1983), discussing the scope of §704(a) protection for EEO personnel.

then the effectiveness of both Title VII and the Executive Order will be undermined. It is an EEO officer who is most likely to recognize compliance problems, bring them to management's attention, and seek voluntary compliance or conciliation of disputes. If this key official is fearful -- justifiably in the Sixth Circuit -- of performing these functions well, then problems will fester and be resolved eventually only through formal complaints and litigation in the federal courts. Again, such a result is entirely at odds with congressional purpose and the public interest in conciliation and compliance.

III.

THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH PULLMAN-STANDARD CO V. SWINT, 456 U.S. 273 (1982).

The district court prefaced its opinion by stating that the case presented difficult questions of reconciling testimony and concluded that the factual disputes,

> [M]ust be resolved by deduction from all of the evidence in the light of its conflicts and inconsistences, the appearances of witnesses on the stand, their manner of testifying, their interests in the outcome of the case, and all the mass of little nuances that enable the finder of the facts to uncover the factual reality which underlies the witnesses' testimony.

App. 22a-23a. The district court, relying on this Court's decision in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983), found that petitioner "clearly has met her burden of persuasion," and, implicitly finding

respondent's proffered reasons to be pretextual, found, after reviewing the totality of the evidence, that petitioner was "discharged because she vigorously opposed what she perceived to be violations of Title VII." App. 39a.

As noted above, the court of appeals did not hold that the district court's findings were clearly erroneous--as indeed it could not, given the evidence of record. Rather, it supported its decision in part by making its own lengthy findings of fact concerning petitioner's conduct. App. 10a-11a, 16a-17a. From these it concluded that petitioner had "disabled herself from continuing to work with company executives," and had not established that the reasons given for her discharge were pretextual. Essentially, the court of appeals held that the district court had applied the wrong legal

standard in assessing petitioner's claim. See App. at 11a-16a.

Thus, even assuming arguendo that the record did not fully support the district court's ultimate finding that §704(a) had been violated, the court of appeals misapplied Rule 52(a), Federal Rules of Civil Procedure, and failed to comply with this Court's holding in Pullman-Standard Co. v. Swint, 456 U.S. 273, 291-92 (1982). Even if the appellate court was correct in its view that the district court's opinion was deficient in some respects, the matter should have been remanded for further findings in light of the proper legal standard. See also Lehman v. Trout, 465 U.S. 1056 (1984).

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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October 16, 1986

APPENDIX

Decisions of the Courts Below

Statutes, Regulations, and Rules Involved

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RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

Nos. 85-3405 & 85-3420

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

E. MARIE HOLDEN,
Plaintiff-Appellee (85-3405),
Plaintiff-Appellant (85-3420),

v.

OWENS-ILLINOIS, INC.,
Defendant-Appellant (85-3405),
Defendant-Appellee (85-3420).

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed June 18, 1986

Before: KENNEDY and MILBURN, Circuit Judges; and JOINER, Senior District Judge.*

KENNEDY, Circuit Judge. Owens-Illinois, Inc. ("Owens") appeals and E. Marie Holden ("plaintiff") cross-appeals from the judgment for plaintiff in this employment discrimination action. During the sumer of 1975, Owens recruited plaintiff to manage the company's affirmative action programs and to design and implement affirmative action plans that would

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*The Honorable Charles W. Joiner, Senior Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

comply with Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (September 24, 1965), *reprinted in* 42 U.S.C. § 2000e note, *as amended* ("Executive Order No. 11,246"). Plaintiff eventually accepted the position and agreed to commence employment on October 1, 1975. After approximately six weeks, Owens terminated plaintiff's employment on November 11, 1975. The District Court held that Owens discharged plaintiff because she aggressively sought to do her job and that the discharge violated 42 U.S.C. § 2000e-3(a), the "opposition clause" in Title VII of the Civil Rights Act of 1964 ("Title VII"), *as amended*, 42 U.S.C. § 2000e. We hold that plaintiff's attempts to implement affirmative action plans which would comply with Executive Order No. 11,246 do not qualify as protected activity under the opposition clause. We also hold that the District Court did not err in dismissing plaintiff's state law claim for wrongful discharge. Accordingly, we reverse the judgment for plaintiff on the "opposition clause" claim and remand the case to the District Court with instructions to dismiss plaintiff's complaint.

Plaintiff commenced this action on September 2, 1976 in the United States District Court for the Northern District of Ohio. Plaintiff's complaint alleged diversity of citizenship and asserted a claim under state law for "fraudulent representation." Joint Appendix at 8. Plaintiff filed an amended complaint on February 15, 1977 which added a claim alleging that Owens' termination of her employment violated Title VII. Plaintiff's amended complaint alleged that "her firing was racially motivated, in that the plaintiff was a black woman, insisting on compliance by the defendant with Title VII, and furthermore that her firing was retaliatory in that it resulted from plaintiff's insistence upon the company's compliance with Title VII ...." Joint Appendix at 20. Plaintiff's pre-trial brief, however, clarified her federal claim:

> The court will note that we have not pleaded that the plaintiff was fired because she was a black female. We are pleading, rather, that defendant's

> discharge was "in retaliation" for plaintiff's proper use of Title VII, thereby falling under the express provisions of Title 42 US Code § 2000e-3 [sic] which provides that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter ..." We believe that this language means just what it says.

Joint Appendix at 31.

The District Court conducted a bench trial over three and one-half non-consecutive days in September and October, 1981. At the close of plaintiff's evidence, Owens moved for an involuntary dismissal under Fed. R. Civ. P. 41(b). Owens argued that plaintiff did not make out a claim under 42 U.S.C. § 2000e-3(a) because Title VII did not cover plaintiff's opposition to Owens' employment practices. The District Court reserved its ruling on the motion, which Owens renewed at the close of all the evidence.

On July 25, 1984, or almost three years after the trial, the District Court rendered its decision on the question of liability. Initially, the District Court concluded that since plaintiff's employment contract was of indefinite duration, the employment contract was terminable at will. Accordingly, the District Court ruled for Owens on the state law cause of action and granted Owens' Fed. R. Civ. P. 41(b) motion on that claim. On the federal claim, the District Court found that:

> There is no doubt in the Court's mind that at the time the defendant employed the plaintiff, its employment practices were in many respects discriminatory, especially as to race, but also as to gender. It had been following the common practice of window-dressing by token employment of minority individuals, rather than seriously trying to change

> its methods and to remedy the results of its past discriminatory actions. When the plaintiff, perhaps with more zeal than good judgment, moved aggressively to try to get action, she was summarily discharged.

Joint Appendix at 61. The District Court awarded plaintiff full back pay, holding that although plaintiff had earned less than $1,000 during the eight and one-half years since Owens terminated her employment, Owens had failed to prove a lack of mitigation. The District Court instructed the parties to meet and attempt to agree on the appropriate amount of back pay. The District Court also awarded reinstatement even though, as the District Court expressly acknowledged, plaintiff had not requested reinstatement in her prayer for relief.

Although the parties stipulated to several matters affecting the computation of back pay, the parties could not agree as to the appropriate treatment for income taxes and lost pension benefits. Consequently, the District Court held a hearing on those issues affecting damages on December 12, 1984. Plaintiff claimed that she would have to pay more income taxes on the lump-sum back pay award than she would have had to pay if she had received her wages on an annual basis. Accordingly, plaintiff requested an addition to the amount of damages to compensate her for this increased tax liability. Plaintiff also requested monetary compensation in lieu of pension credit. The District Court refused to increase the amount of damages to compensate plaintiff for increased income taxes and awarded pension credit rather than the dollar value of her lost pension benefits. On March 29, 1985, the District Court issued an order entering judgment against Owens. On April 24, 1985, the District Court amended the previous order to enter a judgment against defendant for $372,279.45. On May 9, 1985, the District Court, sua sponte, entered an order to correct a clerical mistake in the April 24, 1985 order and amended the order by changing the amount of the judgment to $361,835.45.

This appeal and cross-appeal raise seven issues: (1) Whether plaintiff's actions seeking to implement an affirmative action program that would comply with Executive Order No. 11,246 qualified as protected conduct under 42 U.S.C. § 2000e-3(a); (2) Whether the District Court abused its discretion in excluding as irrelevant: (a) evidence that a previous employer terminated plaintiff for reasons similar to those that defendant gave for plaintiff's termination; and (b) evidence that plaintiff physically assaulted another employee shortly before defendant terminated plaintiff's employment; (3) Whether the District Court's conclusion that defendant terminated plaintiff for engaging in protected conduct is clearly erroneous or erroneous as a matter of law; (4) Whether the District Court erred in granting plaintiff reinstatement to her previous position even though plaintiff did not request such relief in her pleadings or at trial; (5) Whether the District Court erred in dismissing the claim for wrongful discharge under Ohio law; (6) Whether the District Court erred in denying plaintiff additional damages for the tax effect of receiving a large sum of back pay in one year; and (7) Whether the District Court erred in granting plaintiff pension credit rather than the cash equivalent of defendant's contribution to the pension. For the reasons stated below, we hold that plaintiff's actions seeking to implement an affirmative action program which would comply with Executive Order No. 11,246 do not qualify as protected conduct under 42 U.S.C. § 2000e-3(a) and that the District Court erred, as a matter of law, in concluding that defendant terminated plaintiff's employment because she engaged in protected conduct. Finally, we hold that the District Court did not err in dismissing plaintiff's state law claim for wrongful discharge. Accordingly, we reverse the judgment for plaintiff and remand the case to the District Court with instructions to dismiss plaintiff's complaint. In light of this disposition, we need not and do not address the remaining issues.

I.

Title 42 U.S.C. § 2000e-3(a)[1] contains two separate clauses which prohibit an employer from retaliating against an employee—an "opposition clause," which prohibits discrimination or retaliation against an employee because the employee "has opposed any practice made an unlawful employment practice by [Title VII]," and a "participation clause," which prohibits discrimination or retaliation against an employee because the employee "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." *See Sias v. City Demonstration Agency*, 588 F.2d 692, 694 (9th Cir. 1978). Although plaintiff filed a discrimination charge against Owens the day before the company terminated her employment, plaintiff has not alleged that Owens fired her because she filed a discrimination complaint. Consequently, this case involves the "opposition clause."

Owens argues that the District Court erred as a matter of law, and as a matter of fact, in concluding that Owens terminated plaintiff's employment because she opposed certain employment practices that violated Title VII. Although the District Court's opinion contains the following language, the District Court did not make any specific findings regarding the violations of Title VII that plaintiff "opposed."

> [P]laintiff was discharged because she vigorously opposed what she perceived to be violations of Title VII. There is no doubt that her perceptions were

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[1]Title 42 U.S.C. § 2000e-3(a) provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

> based in fact. This Court has little difficulty concluding that her conduct was protected conduct within the meaning of Title VII, and has even less difficulty concluding that but for her willingness and attempts to do her job effectively she would not have been discharged.

Joint Appendix at 65. A complete reading of the transcript, the record, and the District Court's opinion in this case indicates that the District Court treated plaintiff's aggressive attempts to implement affirmative action plans that would comply with Executive Order No. 11,246 as the "opposition" in this case.

Owens argues that even if it terminated plaintiff's employment because she aggressively and zealously sought to implement an affirmative action plan which would comply with Executive Order No. 11,246, plaintiff's actions did not constitute protected conduct. We agree. On its face, 42 U.S.C. § 2000e-3(a) only protects "opposition" to employment practices that violate Title VII. Although Executive Order No. 11,246 requires government contractors to establish affirmative action programs,[2] Title VII does not mandate the imple-

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[2]Section 202 of Executive Order 11,246 provides in pertinent part:

> Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:
>
> "During the performance of this contract, the contractor agrees as follows:
>
> "(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. . . ."

mentation of affirmative action. 42 U.S.C. § 2000e-2(j) provides in pertinent part:

> Nothing contained in this subchapter shall be interpreted to require any employer ... to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer ... in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981), the Supreme Court stated: "Title VII, however, does not demand that an employer give preferential treatment to minorities or women." *See also United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 205-07 (1979). Since Title VII does not require the adoption of affirmative action programs, to the extent that plaintiff sought to implement an affirmative action plan which would comply with Executive Order No. 11,246, plaintiff was not opposing a practice that violated Title VII. Consequently, the District Court erred in treating plaintiff's attempts to implement an affirmative action program which would comply with Executive Order No. 11,246 as protected conduct under the "opposition clause."

As we have previously mentioned, the District Court did not identify any specific conduct which might have constituted "opposition" within the meaning of 42 U.S.C. § 2000e-3(a). Furthermore, the District Court did not identify any conduct of defendant which violated Title VII. In response to a question from the bench at oral argument, however,

plaintiff's counsel claimed that plaintiff presented evidence that, in at least two instances, she "opposed" conduct that violated Title VII. First, counsel stated that plaintiff testified that she informed John Chadwell, the Director of Human Resources, and Clint Wagner, the Personnel Manager, that the substantial concentration of minorities in a non-supervisory job category in the mail room violated Revised Order No. 4.[3] Since Revised Order No. 4 implements Executive Order No. 11,246, however, plaintiff was not opposing conduct that violated Title VII in complaining about conditions in the mail room.[4]

Second, counsel noted that plaintiff testified that she complained to Chadwell and Phil Anthony, her immediate supervisor, that several employees told her that Owens was passing over minorities and women for promotions. Plaintiff testified that, shortly after Owens circulated a memo announcing her hiring, several minority women complained to her that they had frequently been passed over for promotions. Two women in particular—one was a sophomore in college and the other may have been a freshman who was going to college at night, complained that they had applied for posted jobs that would have been promotions but they did not even get the courtesy

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[3]Revised Order No. 4, 41 C.F.R. §§ 60-2.1-60-2.32 (1985), is an order issued by the Office of Federal Contract Compliance Programs pursuant to Executive Order No. 11,246 and sets forth the procedures and standards governing the formulation of affirmative action programs by nonconstruction federal government contractors. *See* B. Schlei & P. Grossman, *Employment Discrimination Law*, 1273 n.13 (2d ed. 1983).

[4]Although 42 U.S.C. § 2000e-2(a)(2) makes it "an unlawful employment practice ... to ... segregate ... employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin," plaintiff made her complaint about the mail room in terms of Revised Order No. 4 and there was no evidence that the large number of minorities working as mail handlers violated 42 U.S.C. § 2000e-2(a)(2).

of an interview to compete for the positions. Plaintiff testified that Chadwell told her that he was not going to get involved in the matter and told her to "Forget it." Nonetheless, plaintiff testified that she asked Wagner, the personnel manager, if he would do her the favor of talking to the two women and he said that he would. Plaintiff testified that Wagner met with the two women, but that the day after the meeting, the company removed the posting and informed the applicants that the job was nonexistent. Plaintiff testified that two days later, however, the position was again posted with the additional requirement of a college degree. Plaintiff did not complain about the manner in which Wagner handled the matter. Although such complaints would qualify as protected activity, there is no evidence that the complaints were a cause of plaintiff's discharge. Wagner did not participate in the decision to discharge plaintiff. There is no evidence that either Chadwell or Anthony knew of plaintiff's later efforts on behalf of the two women. In light of the timing of plaintiff's termination, which occurred immediately after her trip to the Shreveport, Louisiana plant, we can find no evidence that plaintiff's complaints that the company was passing over women and minorities for promotions was a cause for the termination.

Early in plaintiff's employment, Anthony asked plaintiff to critique the affirmative action plan for the company's Bridgeton, New Jersey plant to ensure that the plan complied with Revised Order No. 4. Plaintiff subsequently told Anthony that she could not do the critique because she could not verify the numbers without actually visiting the plant. Plaintiff suggested that she visit a plant and put a plan together from scratch so that Owens would have a model for other plants. Anthony agreed and arranged a trip for plaintiff to the Shreveport plant, which did not have an affirmative action plan because it was a new facility.

Upon her arrival at the Shreveport plant, plaintiff requested various information. Although plaintiff complained that the plant did not give her the information that

she needed. the only specific information that plaintiff testified that the plant did not give her was a salary key to enable her to determine the salaries of the plant's employees. Plaintiff, however. acknowledged that she received a memorandum which included a listing of points and rate groups for particular jobs. Although plaintiff testified that she could not remember whether a salary key was attached to the memorandum, both the plant personnel director, Larry Joe Stump, and Virginia Phelps. Stump's secretary, testified that they gave plaintiff the salary key and a copy of the labor agreement. When Stump refused to permit plaintiff to interview employees who had filed discrimination charges against the company, plaintiff called Anthony in Toledo to seek his support. Anthony told plaintiff that her job did not require her to contact those employees and that if she did the employees could accuse the company of retaliating against them. Eventually, the Shreveport plant manager, Robert Falter, complained to Anthony that plaintiff was unreasonable, uncooperative, and demanding and that she acted like a compliance officer rather than like a person sent down there to give technical assistance. Consequently, Anthony recalled plaintiff to Toledo. Although Anthony told plaintiff to go ahead with a meeting that plaintiff had scheduled with community leaders and Stump, plaintiff cancelled the meeting. Anthony also instructed plaintiff to return to Toledo immediately so that she would be in the office the next day to meet with him because he would be out of town on Thursday and Friday of that week. Plaintiff did not return to Toledo until the following day because she felt tired. Furthermore, she did not go to the office until Thursday when Anthony was already out of town. Once in the office, she sent a memo to Anthony, Chadwell. and J. W. Hanlon, Jr., Chadwell's supervisor.

Although courts should liberally construe the "opposition clause," *see Sias v. City Demonstration Agency, supra* at 695, 42 U.S.C. § 2000e-3(a) does not protect all "opposition" activity. In *Hochstadt v. Worcester Foundation for Experi-*

mental Biology, 545 F.2d 222 (1st Cir. 1976), the First Circuit stated:

> [W]e think courts have in each case to balance the purpose of the Act to protect persons engaging reasonably in activities opposing ... discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel.... The requirements of the job and the tolerable limits of conduct in a particular setting must be explored. The present case, therefore, raises the question, put simply, of whether plaintiff went "too far" in her particular employment setting.

Id. at 231 (footnote omitted). In *Rosser v. Laborers' International Union*, 616 F.2d 221 (5th Cir.), *cert. denied*, 449 U.S. 886 (1980), the Fifth Circuit stated:

> Even though opposition to an unlawful employment practice is protected, such protection is not absolute. There may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed. In such a case, his conduct, or form of opposition, is not covered by § 704(a).

Id. at 223 (citations omitted). *See also EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014-16 (9th Cir. 1983). *Cf. Brown v. Ralston Purina Co.*, 557 F.2d 570, 572 (6th Cir. 1977) ("an EEOC complaint creates no right on the part of an employee to miss work, fail to perform assigned work, or leave work without notice") ("participation clause").

An employee does not receive special protection under Title VII simply because the employee handles discrimination complaints or works on affirmative action matters. In *Whatley v. Metropolitan Atlanta Rapid Transit Authority*, 632

F.2d 1325 (5th Cir. 1980), the Fifth Circuit held that 42 U.S.C. § 2000e-3(a) does not prevent an employer from dismissing an employee who handles discrimination complaints as part of his job when the employee handles those complaints contrary to the instructions of the employer. The Fifth Circuit affirmed, as not clearly erroneous, the district court's findings that appellant's "dismissal was a culmination of problems growing out of appellant's manner of handling his job, his lack of cooperation within his office, his mismanagement of his staff, his refusal to comply with the terms of his job description, and his refusal to follow instructions from his supervisor." *Id.* at 1329. *See also Smith v. Singer Co.*, 650 F.2d 214 (9th Cir. 1981).

In *Smith v. Singer Co., supra*, Smith brought an action against Singer Company ("Singer") alleging that Singer violated 42 U.S.C. § 2000e-3(a) by terminating his employment as director of industrial relations because he engaged in protected activities. The Ninth Circuit gave the following description of Smith's position:

> The job required appellant to develop affirmative action programs; assist in identifying problem areas; assist management in solving problems; design audit and reporting systems to measure the effectiveness of the programs; serve as a liaison between the contractor and the enforcement agencies and between the contractor and the minority, women's and community action groups; and keep management informed of the latest developments in equal opportunity enforcement.

Id. at 215. Smith asserted that his discharge was retaliatory because "he encountered lack of cooperation and commitment from the company in his efforts to accomplish needed reforms in the affirmative action program . . . ." *Id.* The district court, however, found that Singer discharged Smith "for failure to perform tasks fundamental to his position" because Smith had filed complaints against Singer with the Contracts

Compliance Division of the Defense Contracts Administration Service and the Equal Employment Opportunity Commission and then denied "knowledge of the identity of the charging parties." *Id.* at 216. The Ninth Circuit observed that:

> It was the very purpose of appellant's job to assist Singer in achieving such [voluntary] compliance; the job was held by him not as a private attorney general but as a company executive. The position was unique in that it required the occupant to act *on behalf of* his employer in an area where normally action against the employer and on behalf of the employees is protected activity.

Id. at 217. The court concluded:

> By filing complaints against Singer because he disagreed with their choice of policies, appellant placed himself in a position squarely adversary to his company. In so doing he wholly disabled himself from continuing to represent the company's interests as its liaison with the enforcement agencies, and from continuing to work with Singer executives in the voluntary development of nondiscriminatory hiring programs.

Id. Since Smith had "rendered himself unable to fulfill the functions of his office," *id.*, the Ninth Circuit held that Singer neither discriminated nor retaliated against Smith in terminating his employment. Accordingly, the Ninth Circuit affirmed the district court order dismissing Smith's complaint.

The District Court, however, distinguished *Smith v. Singer Co.* on the grounds that the similarity between that case and this case "begins and ends with the recitation of the job description." Joint Appendix at 66. The District Court reasoned:

> The plaintiff in *Smith* secretly filed complaints against his employer, and clandestinely solicited

> other employees to do so. He had gone to war with the company while his job required him to work with it to effect affirmative action, to ameliorate violations of Title VII, and to act as a liaison to the agencies with whom he had filed charges. Under such circumstances, he clearly could not perform, and in fact was not performing, the duties of his employment. In the present case, however, the plaintiff was trying conscientiously to get the defendant to mend its ways, and to be conciliatory with employees who had filed or were likely to file complaints against it. This was the ultimate purpose of plaintiff's employment, and far from being opposed to the defendant's interests, was strongly supportive of them.

Joint Appendix at 66-67. In a footnote, the District Court continued:

> The Ninth Circuit, the same court that decided *Smith*, is the only court which has referred to it in a published opinion. In *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346 (9th Cir. 1984), the court distinguished the *Smith* decision, emphasizing that Smith concealed his actions, and because of them negated his ability to do his job. *Id.* at 1355 n.6. Similarly, in the cause before this Court, plaintiff never employed subterfuge or so aligned herself with interests adverse to defendant as to render her incapable of performing her duties.

Joint Appendix at 67 n.2.

Although in *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1355 n.6 (9th Cir. 1984), the Ninth Circuit initially may have limited *Smith v. Singer Co., supra*, to the facts of that case, in *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1446 (9th Cir. 1985), the Ninth Circuit cited *Smith v. Singer Co.* after stating that:

> An employee is not protected by Title VII when he violates legitimate company rules, knowingly disobeys company orders, disrupts the work environment of his employer, or willfully interferes with the attainment of the employer's goals.

Id. at 1446 (citations omitted). Consequently, we do not restrict *Smith v. Singer Co.* to its unique facts.

Owens argues that plaintiff's overbearing and adversarial attitude disabled her from continuing to work with company executives in the voluntary development of affirmative action programs. Although Owens hired plaintiff to manage the company's affirmative action programs and to design and implement affirmative action plans that would comply with Executive Order No. 11,246, Owens did not hire plaintiff to handle discrimination complaints or to establish the company's affirmative action policies.[5] In acting like a "compliance officer," plaintiff disabled herself from continuing to work with company executives in the voluntary development of affirmative action programs. The District Court held that plaintiff's "zeal to do the work she was employed to do tended to make [her] more rigid and unyielding in her demands than she perhaps should have been." Joint Appendix at 58-59.

Finally, the District Court implicitly acknowledged that plaintiff had engaged in numerous instances of unsatisfactory behavior during her six-week employment with Owens. After discussing plaintiff's trip to Owens' Shreveport, Louisiana plant, the District Court stated:

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[5]Philip Anthony, plaintiff's immediate supervisor and the company's Manager, Equal Opportunity Programs Administration, recruited plaintiff to replace John Gregory. Anthony's supervisor, John Chadwell, another black male who was the Company's Director of Human Resources Administration, approved plaintiff's hiring. Owens had previously shifted Gregory, a black male, to the newly created position of Manager, Equal Opportunity Compliance Programs. In that position, Gregory reported to Anthony and was responsible for handling employment discrimination charges and complaints.

> Plaintiff took longer to come back than she might have taken, and was ill when she returned. This interfered with her reporting in person to her superior. There was also a misunderstanding about a meeting plaintiff had scheduled with community leaders in Shreveport. When she was told to return to Toledo, she cancelled the meeting, feeling that it would be in vain without the support of her superiors. This does not appear to have been an unreasonable action, in view of the totality of the circumstances, but is cited by the defendant as another instance of plaintiff's insubordination and inability to perform her job.
>
> When plaintiff returned to Toledo, she compounded the wrong of coming late by sending a written memorandum, not only to her immediate superior, but to his superior. This, of course, is the unpardonable corporate sin, not going through channels. It was followed by plaintiff's discharge.

Joint Appendix at 60-61. We hold, as a matter of law, that plaintiff never proved, by a preponderance of the evidence, that the legitimate reasons that Owens offered for her termination were but a pretext for retaliation. Owens was entitled to decide the manner in which the company would implement its affirmative action programs. Owens was not required to accept plaintiff's position that her job included compliance work as well as writing and amending affirmative action plans. Consequently, we reverse the judgment for plaintiff on the "opposition clause" claim.

II.

Plaintiff argues that the District Court erroneously dismissed her claim for wrongful discharge under Ohio law. As to that claim, the District Court granted Owens' Fed. R. Civ. P. 41(b) motion to dismiss plaintiff's amended complaint. The District Court reasoned that since the employment con-

tract between plaintiff and Owens had an indefinite duration, under Ohio common law the agreement was terminable at will by either party. Accordingly, the District Court concluded that the "employment at will" doctrine barred recovery.

Plaintiff contends that the District Court erred in not recognizing a "public policy" exception to the "employment at will" doctrine. Plaintiff argues that Owens terminated her employment because she advocated compliance with Executive Order No. 11,246, which she claims sets forth the public policy of the United States. Although plaintiff's counsel mentioned a public policy argument while responding to Owens' Fed. R. Civ. P. 41(b) motion and in closing argument, plaintiff did not assert this exception in her complaint nor did the parties try this theory in the District Court. Rather, plaintiff based her state law wrongful discharge claim on fraud, misrepresentation, and breach of contract. Consequently, we will not allow plaintiff to raise this "public policy" exception, for the first time on appeal, almost ten years after plaintiff filed her original complaint. *See, e.g., Bender v. Southland Corp.*, 749 F.2d 1205, 1215 (6th Cir. 1984); *Ghandi v. Police Department of the City of Detroit*, 747 F.2d 338, 343 (6th Cir. 1984) (citations omitted) ("Having presented their claims in the district court under one theory, plaintiffs cannot save their claim against the FBI by proceeding under a new theory on appeal."). Furthermore, in *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, _ N.E.2d _ (1985), the Supreme Court of Ohio recently held that: "An at-will employee who is discharged for reporting to his employer that it is conducting its business in violation of law does not have a cause of action against the employer for wrongful discharge." *Id.*, _ N.E.2d _ (paragraph two of the syllabus.)[6] Therefore, we conclude

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[6]Under Ohio practice, the syllabus of a decision of the Supreme Court of Ohio rather than the text of the opinion states the law of the case. *See Cassidy v. Glossip*, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967).

that the District Court did not err in dismissing plaintiff's state law claim for wrongful discharge.

Accordingly, we reverse the District Court's order granting judgment for plaintiff and remand the action to the District Court with instructions to dismiss plaintiff's complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

E. Marie Holden,

Plaintiff,

vs.

Owens Illinois, Inc.,

Defendant.

Case No. C 76-442

OPINION AND ORDER
[Filed July 25, 1984]

YOUNG, J:

This action was originally commenced by the plaintiff after she received a right to sue letter from the Equal Employment Opportunity Commission. This case was tried to the court, sitting without a jury, upon the amended complaint and the answer thereto.

The amended complaint stated two causes of action. The first cause of action was for wrongful discharge from employment. Jurisdiction was asserted upon the grounds of diversity of

citizenship. The second cause of action is laid under Title VII of the Civil Rights Act. The plaintiff claims that her discharge was retaliatory, falling under Title 42 U.S.C. §2000e-3, which provides in part that, "it shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this sub-chapter...."

The defendant responded to plaintiff's first cause of action by asserting that her employment was for an indefinite term, and hence terminable by it at will, and that she had concealed and misrepresented her past employment history and experience when seeking employment with the defendant.

As to the second cause of action, the defendant denies that its

discharge of the plaintiff was in any way retaliatory, and alleges that defendant was in no way guilty of any discrimination in employment.

This case presents the usual difficulty of such cases, that much of the evidence is the subjective reactions and rationalizations, conscious or unconscious, of the witnesses. Only one witness, who was called by the plaintiff, can be considered as disinterested, but his testimony did not deal with any completely dispositive element of the evidence. Under these circumstances, a minute, item-by-item analysis of the evidence in the case would not be helpful in resolving the factual disputes. Rather, these disputes must be resolved by deduction from all of the evidence in the light of its conflicts and inconsistencies, the appearances of the

witnesses on the stand, their manner of testifying, their interests in the outcome of the case, and all the mass of little nuances that enable the finder of the facts to uncover the factual reality which underlies the witnesses' testimony. This Opinion will serve as the Court's findings of fact and conclusions of law. Fed.R.Civ.P. 52(a).[1]

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[1] At the close of plaintiff's case in chief, the defendant, pursuant to Fed.R.Civ.P. 41(b), moved for dismissal of plaintiff's amended complaint. The court reserved ruling on the motion, which thereafter was renewed at the close of all the evidence. The Court again reserved its ruling. Since the case was heard and submitted on all the evidence, as a practical matter the Court's disposition of the motion as such largely is irrelevant. Appellate review of this Court's ruling on the motion will encompass all of the evidence submitted in this cause. See A & N Club v. Great American Insurance Co., 404 F.2d 100, 103 (6th Cir. 1968). In any event, for the reasons set forth in this Opinion and Order, defendant's motion, as it relates to the first cause of action, is sustained, and is overruled as it relates to the second cause of action.

The actual trial of the case commenced on September 28, 1981, and required three and one-half days. The trial was interrupted by the trial of two other civil rights cases, and hence was not concluded until October 20, 1981.

In the summer of 1975, the plaintiff was employed by the defendant as Manager, Equal Opportunity Affirmative Action Programs, commencing October 1, 1975, at an annual salary of Twenty Thousand Five Hundred Dollars ($20,500.00) payable at a monthly rate of Seventeen Hundred Nine Dollars ($1,709.00).

The employment agreement was entered into without the defendant making any effort to check on plaintiff's recited qualifications or her past employment history. The defendant argues vehemently that the plaintiff omitted from her resume a prior employment from which she had been

discharged after a considerable conflict with her employers. From this defendant claims that it is properly able to discharge the plaintiff at any time at all.

There are two major flaws in this argument. The first is that as previously mentioned, the defendant hired the plaintiff without making any serious attempt to explore her past employment history. The second is that the difficulties involved in the allegedly concealed employment had little, if anything, to do with the plaintiff's qualifications for the position in which the defendant employed her. The Court has no doubt that the defendant would have employed the plaintiff exactly as it did if it had been aware of the plaintiff's loss of the particular previous employment.

At the time the defendant was seeking to fill its position, black females qualified for executive or professional positions were in extremely short supply. Bidding for their services was highly competitive, because of the pressing necessity of avoiding charges of employment discrimination. Of course such unpleasant realities were not, and for that matter still are not, so bluntly stated as they are stated here, but they are part of the background of the anti-discrimination statutes that have been enacted, and must be taken into consideration in resolving litigation based on these statutes.

The record is completely clear that the plaintiff was well-qualified, by study and experience, for the position she was employed to fill. The only negative thing about her was that her zeal to do

the work she was employed to do tended to make her more rigid and unyielding in her demands than she perhaps should have been. On the other hand, the record is even clearer that the defendant was not prepared to have someone come in and really do the job that needed to be done. It wanted someone to serve as a figurehead, but who wouldn't really report anybody or anything.

Although the defendant's table of organization shows plaintiff's position to be a relatively high-level one, and the defendant had employed her a considerable time before she actually reported to duty, no real arrangements had been made for her to have an office, or even a desk, proper clerical support, and access to the records and information she needed to do her job.

Of course, the defendant

attempted to explain this away by showing how enormously complex its organization is, and the physical and logistical problems that arise when new high level positions are created. Human beings are exceedingly ingenious in creating euphemisms and explanations why obvicusly discriminatory actions really aren't discriminatory at all. An impartial and disinterested fact-finder has no real difficulty in penetrating such smoke screens.

Shortly after she had arrived, the plaintiff was sent to a new plant of the defendant in Shreveport, Louisiana, to set up an affirmative action program. The plant had no such program at all, although it was supposed to have, and was fighting a number of discrimination charges. The plant manager there was blatantly discriminatory in his treatment of the

plaintiff. She was not given any proper place to work. Her attempt to get information she needed to design plans was withheld. She was not permitted to interview specific employees. Although the plant manager always addressed his white female secretary formally by her last name, he addressed the plaintiff by her first name. Such condescension is a clear sign of contemptuous and discriminatory attitude. He did not keep appointments with plaintiff, and let her cool her heels in his waiting room for long periods of time when she wanted to talk to him. There was some evidence that other visitors from company headquarters were given "red carpet" treatment when they came to Shreveport. The plaintiff certainly got no such treatment.

The plaintiff tried in vain to get support by calling her superiors at

headquarters. Ultimately she was told to come back to Toledo. Plaintiff took longer to come back than she might have taken, and was ill when she returned. This interfered with her reporting in person to her superior. There was also a misunderstanding about a meeting plaintiff had scheduled with community leaders in Shreveport. When she was told to return to Toledo, she cancelled the meeting, feeling that it would be in vain without the support of her superiors. This does not appear to have been an unreasonable action, in view of the totality of the circumstances, but is cited by the defendant as another instance of plaintiff's insubordination and inability to perform her job.

When plaintiff returned to Toledo, she compounded the wrong of coming late by sending a written memorandum, not

only to her immediate superior, but to his superior. This, of course, is the unpardonable corporate sin, not going through channels. It was followed by the plaintiff's discharge.

The matters discussed immediately above are not the entirety of plaintiff's activities in defendant's employ and the problems related thereto that were brought out in the evidence, but it would serve no useful purpose to go into further detail cencerning the evidence and the facts.

There is no doubt in the Court's mind that at the time the defendant employed the plaintiff, its employment practices were in many respects discriminatory, especially as to race, but also as to gender. It had been following the common practice of window-dressing by token employment of minority individuals,

rather than seriously trying to change its methods and to remedy the results of its past discriminatory actions. When the plaintiff, perhaps with more zeal than good judgement, moved aggressively to try to get action, she was summarily discharged. To a considerable extent this last finding supports the plaintiff's claim that the defendant induced her to enter its employ by fraudulent representation that it was dedicated to the concept of equal opportunity in employment, when it really was not. However, the problem of fraud is not a simple one. It is difficult to find that self-deception constitutes actual fraud when it also deceives others, as it tends to negative the willfullness which is an essential element of fraud.

Coming now to consider the legal aspects of the problems presented, as to

the plaintiff's first cause of action, the Court concludes that the employment contract between parties was of indefinite duration, and hence under common law of Ohio was terminable by either party at will. See Henkel v. Educational Research Council of America, 45 Ohio St. 2d 249, 344 N.E. 2d 118 (1976); Hendrick v. Center for Comprehensive Alcohol Treatment, 7 Ohio App. 3d 211, 454 N.E. 2d 1343 (1982) (per curiam); Peterson v. Scott Construction Co., 5 Ohio App. 3d 203, 451 N.E. 2d 1236 (1982) (per curiam). Accord, Smith v. Teledyne Industries, Inc., 578 F.Supp. 353 (E.D. Mich. 1984) (construing Ohio law); Weaver v. Shopsmith, Inc., 556 F.Supp. 348 (S.D. Ohio 1982) (same); Dadas v. Prescott, Ball & Turben, 529 F.Supp. 203 (N.D. Ohio 1981) (same). Moreover, Ohio law seems to hold that fraud in the inducement, or other malicious action,

cannot alter the right to terminate at will a contract for an indefinite term. See Fawcett v. G.L. Murphy & Co., 46 Ohio St. 2d 245, 348 N.E. 2d 144 (1976). Accord, Smith, 578 F.Supp. at 356 (construing Ohio law); Dadas, 529 F.Supp. at 206 (same). But cf. Merkel v. Scovill, Inc., 570 F.Supp. 133 (S.D. Ohio 1983) (court, construing Ohio law, held that terminable at will doctrine not applicable when discharge based on refusal to commit perjury).

For the foregoing reasons, the plaintiff cannot recover against the defendant upon her first cause of action. It had the right under the applicable law of Ohio to discharge her at any time, and for any reason, or no reason.

Upon the plaintiff's second claim, that of retaliatory discharge forbidden by 42 U.S.C. §2000e-3, the Court

concludes that the plaintiff was in fact discharged because she was strenuously seeking to bring the defendant into full compliance with its duty not to discriminate in employment.

Title VII provides in part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

42 U.S.C. §2000e-3(a). This statutory provsion "is to be broadly interpreted and applied by the courts so as to zealously protect the rights of employees under Title VII." Held v. Missouri Pacific Railroad Co., 373 F.Supp. 996, 1004 (S.D. Tex. 1974). Accord, Jeffries v. Harris County Community Action Association, 425

F.Supp. 1208, 1216 (S.D. Tex. 1977), aff'd in part, rev'd in part on other grounds, 615 F.2d 1025 (5th Cir. 1980); E.E.O.C. v. Kallir, Philips, Ross, Inc., 401 F.Supp. 66, 72 (S.D. N.Y. 1975).

To prevail on a Title VII retaliation claim, a plaintiff first must show "that she engaged in a protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two." Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346, 1354 (9th Cir. 1984) (citing Cohen v. Fred Mayer, Inc., 686 F.2d 793, 796 (9th Cir. 1982)); McMillan v. Rust College, Inc., 710 F.2d 1112, 1116 (5th Cir. 1983); Canino v. United States E.E.O.C., 707 F.2d 468, 471 (11th Cir. 1983). See also Brown v. ASD Computing Center, 519 F.Supp. 1096, 1114-1115 (S.D.

Ohio 1981) (prima facie case of retaliation made out by showing protected activity, employer's knowledge thereof, adverse employment action, and retaliatory motive on part of employer) (citing Sutton v. National Distillers Products Co., 445 F.Supp. 1319, 1325-1326 (S.D. Ohio 1978), aff'd 628 F.2d 936 (6th Cir. 1980)). The burden then shifts to the defendant to articulate a legitimate, nonretaliatory justification for the action. Wrighten, 726 F.2d at 1354. Once the defendant has met this burden of production, the plaintiff then must be given the opportunity to establish that discriminatory intent motivated the defendant's employment decision. Id. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Since the Court has heard all the evidence, it now will address the ultimate factual

issue, rather than engaging in the foregoing three-tiered evidentiary analysis. See United States Postal Service Board of Governors v. Aikens, ___U.S.___, ___, 103 S.Ct. 1478, 1482 (1983); Talley v. United States Postal Service, 720 F.2d 505 (8th Cir. 1983); Jones v. International Paper Co., 720 F.2d 496 (8th Cir. 1983); Sherman v. Lee's Summit, Missouri, 577 F.Supp. 568 (D. Mo. 1983).

In a Title VII retaliation case, the question to be answered is whether or not the plaintiff has demonstrated by a preponderance of the evidence "that engaging in protected activity under §2000e-3 was one of the reasons for the termination, and that but for such activity a plaintiff would not have been fired." Wrighten, 726 F.2d at 1354 (citing Kauffman v. Sidereal Corp., 695

F.2d 343, 345 (9th Cir. 1982)). But cf. Cohen, 686 F.2d at 798 (§2000e-3 plaintiff required to show that defendant acted, at least in part, with a retaliatory motive or intent). Plaintiff clearly has met her burden of persuasion in the cause sub judice.

As noted above, plaintiff was discharged because she vigorously opposed what she perceived to be violations of Title VII. There is no doubt that her perceptions were based in fact. This Court has little difficulty concluding that her conduct was protected conduct within the meaning of Title VII, and has even less difficulty concluding that but for her willingness and attempts to do her job effectively she would not have been discharged.

Smith v. Singer, 650 F.2d 214 (9th Cir. 1981), relied upon by defendant,

does not compel a contrary conclusion. In that case, the plaintiff was employed to oversee the defendant's equal opportunity programs. As part of his duties, the plaintiff was required:

> to develop affirmative action programs; assist in identifying problem areas, assist management in solving problems; design audit and reporting systems to measure the effectiveness of the programs; serve as liaison between the contractor and minority, women's and community action groups; and keep management informed of the latest developments in equal opportunity enforcement.

Id. at 215. The similarity of Smith to the cause sub judice, however, begins and ends with the recitation of the job description.

The plaintiff in Smith secretly filed complaints against his employer, and clandestinely solicited other employees to do so. He had gone to war with the company while his job required him to work

with it to effect affirmative action, to ameliorate violations of Title VII, and to act as liaison to the agencies with whom he had filed charges. Under such circumstances, he clearly could not perform, and in fact was not performing, the duties of his employment. In the present case, however, the plaintiff was trying conscientiously to get the defendant to mend its ways, and to be conciliatory with employees who had filed or were likely to file complaints against it. This was the ultimate purpose of plaintiff's employment , and far from being opposed to defendant's interests, was strongly supportive of them. True, the plaintiff did herself file an EEOC complaint against the defendant a day or so before her employment was terminated, but at the time she did so, for all practical purposes she had been deprived

by the defendant of any capability of advancing its real interests, and her ultimate discharge was obviously only a matter of time, regardless of her filing the complaint.[2]

The violation of the statute is too clear to permit any conclusion other than the plaintiff is entitled to recover.

A successful Title VII plaintiff generally is entitled to reinstatement and an award of back pay. The statute, however, does not countenance the award of legal damages, such as compensatory or

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[2] The Ninth Circuit, the same court that decided Smith, is the only court which has referred to it in a published opinion. In Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346 (9th Cir. 1984), the court distinguished the Smith decision, emphasizing that Smith concealed his actions, and because of them negated his ability to do his job. Id. at 1355 n.6. Similarly, in the cause before this Court, plaintiff never employed subterfuge or so aligned herself with interests adverse to defendant as to render her incapable of performing her duties.

punitive damages. See Harrington v. Vandalia-Butler Board of Education, 585 F.2d 192 (6th Cir. 1978), cert. denied, 441 U.S. 932 (1979); Adler v. John Carroll University, 543 F.Supp. 586 (W.D. Ky. 1982).

The law in Title VII employment discrimination cases now is fairly settled in this circuit, at least with respect to the issue of back pay. A back pay award should put the discriminatee in the same position he would have been but for the unlawful discrimination and, absent exceptional circumstances, always should be awarded if a Title VII violation is found. Rasimus v. Michigan Department of Mental Health, 714 F.2d 614 (6th Cir. 1983), cert. denied, 52 U.S.L.W. 3776 (U.S. April 24, 1984). A successful Title VII plaintiff is entitled to receive his salary, including raises, he would have

received absent the discrimination. Rasimus, 714 F.2d at 626. Further, sick leave, vacation pay, pension and other fringe benefits which would have been received by the plaintiff were it not for discrimination also should be included in the back pay award. Id. Income and social security taxes which would have been deducted from the wages the plaintiff would have received absent discrimination should not serve to reduce any back pay award. Id. at 627. Unemployment compensation similarly should not be deducted. Id. Mathematical precision in computing the award is unnecessary, and doubts about the amount a successful plaintiff would have received had there been no discrimination should be resolved against the discriminator. Id. at 628.

While it is true that back pay awards are the rule, not the exception,

once there has been a finding of discrimination, the twin purposes of Title VII should never be lost on the Court. In the words of the Supreme Court,

> [G]iven a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered for past discriminations.

Rasimus, 714 F.2d at 626 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975)). See also Ford Motor Co. v. EEOC, 458 U.S. 219, 102 S.Ct. 3057 (1982).

Further, Title VII claimants are required to mitigate their damages by the express language of §706(g), which provides in pertinent part:

> "[i]nterim earnings or amounts earnable with reasonable diligence by the person...discriminated

> against shall operate to reduce the back pay otherwise allowable."

42 U.S.C. §2000e-5(g). This duty to minimize damages is "rooted in an ancient principle of law," Ford, 458 U.S. at___, 102 S.Ct. at 3065; Rasimus, 714 F.2d at 623, and operates to reduce otherwise proper back pay awards if the successful Title VII plaintiff does not exercise reasonable diligence to find other employment or deliberately incurs economic losses. See Ford, 102 S.Ct. at 3065; Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). While efforts to seek suitable employment need not be successful to satisfy the statutory and common law duty to mitigate damages, the efforts must be reasonable when "evaluated in light of the individual characteristics of the claimant and the job market." Rasimus, 714 F.2d at 695. It is incumbent upon Title VII defendants to show that a successful plaintiff has failed to

exercise this duty to make reasonable attempts to mitigate damages. Id.

The Sixth Circuit recently expounded on the defendant's burden to demonstrate a plaintiff's lack of diligence. In Rasimus, the Court of Appeals stated that a defendant discharges its burden only if it establishes the availability of substantially equivalent positions,[3] and the plaintiff's failure to use reasonable care and diligence in seeking these positions. Rasimus, 714 F.2d at 624. See EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980); Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978).

The Court finds that defendant has failed to carry its burden. The evidence

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[3] A substantially equivalent job is defined by the Sixth Circuit as one which provides the plaintiff with virtually the same promotional opportunities, compensation, responsibilities, conditions, and status. Rasimus, 714 F.2d at 624.

clearly shows that plaintiff exercised reasonable care and diligence to find substantially equivalent employment, even though her efforts were unsuccessful. Promptly after being fired, the plaintiff mailed to a multiple of firms, institutions, and governmental agencies letters and her resume with an eye toward obtaining a position comparable to the she had with defendant. Although she did succeed in obtaining several interviews, none resulted in an offer of employment. The Court finds, after considering the nature of the job market from whence she came, as well as plaintiff herself, that her efforts to find substantially equivalent employment in fact were sincere and active.[4] Plaintiff,

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[4] Defendant makes much of the fact that plaintiff did not affirmatively seek employment with Supermarkets General Corporation, the New Jersey firm she left to join the defendant. Defendant failed to show, however, that this firm had a vacant

position substantially equivalent to the one from which she was fired. It also is clear that this firm did not offer her employment. Defendant, quite simply, has failed to show what Rasimus requires it to show before the Court can find that plaintiff failed to discharge her duty to mitigate damages. Moreover, the Court finds, considering all the circumstances, especially her efforts to find employment with potential employers other than Supermarkets, that it was entirely reasonable for plaintiff not to seek actively a job with employer she left less that two (2) months before she was fired by the defendant.

Defendant's only other serious attempt to show that plaintiff failed to mitigate her damages concerns deposition testimony of one Benjamin Collier, who at the time germane to this cause was employed as the Director of the Office of Contract Compliance in the Department of Defense. It was his responsibility to supervise about sixty (60) Equal Employment Opportunity Specialists who reviewed government contractor compliance with executive orders addressing equal employment opportunity and affirmative action. The defendant argues that plaintiff failed to mitigate her damages by not accepting a job offer from him. Defendant's argument, however, is flawed in at least two respects.

First of all, Mr. Collier did not offer the plaintiff a job at all. He testified that "I didn't offer her a specific job. I tried to get her to say that she would come to work for us, and that would mean going through the application process, etc."

therefore, is entitled to an award of back pay from November 11, 1975, the date on which she was, the entry of final judgment. The parties shall attempt to agree on the amount to be awarded, employing the standards enunciated by the Sixth Circuit in Rasimus.

With respect to reinstatement, it seems clear that once a finding of retaliation has been made, reinstatement should be granted as a matter of course. Cf. George v. Farmers Electric Cooperative, Inc., 715 F.2d 175, 178 (5th Cir. 1983) (after

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(Collier deposition at p.33). It is clear, therefore, that the most Mr. Collier did regarding plaintiff's possible employment with the Department of Defense was attempt to persuade her to go through the proper the channels to secure government employment. This is all Mr. Collier could do, given the fact that an Equal Opportunity Specialist was a civil service position which he could not fill by simply hiring someone off the street. Secondly, the Court credits plaintiff's testimony that she in fact did take the appropriate steps to obtain this civil service position, but these efforts bore no fruit.

finding of discrimination, "reinstatement should be granted in all but unusual cases"). Although plaintiff has not specifically prayed for reinstatement, this Court nonetheless may "award appropriate relief dictated by the evidence, even though it may not have been sought in the pleadings." Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980) (citing Fed.R.Civ.P. 54(c)). The plaintiff, therefore, is entitled to be reinstated to her former position with defendant.

Since plaintiff is the prevailing party in one phase of this action, she is entitled to an award of reasonable attorney's fees and costs. See 42 U.S.C. §2000(e)-5(k). The parties shall attempt to settle the attorney's fees question without the necessity of judicial intervention. If the parties cannot agree to an amount for the fees and costs, upon plaintiff's application

the court will set the matter for a hearing or a briefing schedule. The parties should be mindful of the recent judicial discussion concerning the relationship between extent of success in the litigation and the amount of the fees awarded. See, e.g., Hensley v Eckerhart, ___U.S.___, 103 S.Ct. 1933 (1983); Kentucky Association for Retarded Citizens, Inc. v. Conn, 718 F.2d 182 (6th Cir. 1983); Sisco v. J.S. Alberici Construction Co., 564 F.Supp. 765 (E.D. Mo. 1983).

To conclude, counsel for plaintiff and defendant shall attempt to agree on an amount to be awarded as back pay. If, within thirty (30) days from the filing of this Opinion and Order no agreement can be reached, counsel for plaintiff shall, in writing, advise the Court, which will proceed accordingly. The parties also shall attempt to agree on an amount to be awarded for reasonable attorney's fees and costs. Once

again, if the parties are unable to agree on this amount, counsel for plaintiff shall advise the Court which, upon motion, will make arrangements to determine the matter. Finally, notwithstanding any lack of agreement on the attorney's fees and costs question, counsel for plaintiff shall, persuant to Local Civil Rule 5.02, prepare and submit a draft of an order of judgment expressive of the court's findings and conclusions in this Opinion and Order. The time within which to prepare and serve this draft is enlarged to forty-five (45) days to enable the parties to reach agreement on the back pay award.

IT IS SO ORDERED.

/s/

Sr. United States District Judge

Toledo, Ohio.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

E. Marie Holden,

Plaintiff,

vs.

Owens-Illinois, Inc.,

Defendant.

Case No. C 76-442

MEMORANDUM AND ORDER

[Filed March 29, 1985]

YOUNG, J:

This is an action in which the plaintiff claimed that she wrongfully was discharged from her employment by defendant Owens-Illinois, Inc., and that her discharge was retaliatory in violation of Title VII of the Civil Rights Act of 1964. Following a trial before the Court, sitting without a jury, this Court found in favor of the plaintiff on her second claim. See Holden v. Owens-Illinois,

Inc., No. C76-442 (N.D. Ohio July 25, 1984) (Opinion and Order). Concluding that the plaintiff was in fact the victim of a retaliatory discharge forbidden by 42 U.S.C. §2000d-3, the Court directed counsel for both parties to attempt to reach an agreement as to the amount to be awarded as back pay and as to the amount to be awarded for reasonable attorney's fees and costs. Id. Although the parties were able to agree upon several items, certain issues remained unresolved.[1] See Holden v. Owens-Illinois, Inc., C76-442 (N.D. Ohio Dec. 12, 1984) (Stipulation of the Parties).

On December 12, 1984, a hearing was

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[1] The Court appreciates the level of cooperation exhibited by both parties in their attempt to comply with this Court's Opinion and Order. Those issues upon which the parties were unable to agree are complex and the Court commends both counsel for their professionalism.

held before this Court on those issues of damages upon which the parties were unable to come to a complete agreement. Basically, three issues remain to be resolved: (1) whether the statutory or market rate of interest is to be used in computing the plaintiff's back pay award; (2) whether or not plaintiff's increased tax liability should be considered as a component of her back pay award; and (3) the appropriate treatment for the plaintiff's lost pension monies.

As to the first issue, that is, which interest rate is to be applied to the back pay award, the plaintiff asserts that had she not been discriminated against she would have utilized investment opportunities which would have yielded a higher interest rate than the statutory rate. Plaintiff submits, therefore, that it is necessary to apply the market

interest rate in order that she be placed in the position she would have occupied absent discrimination. Defendant has offered no arguments to indicate its preference as to which interest rate should be selected.

Generally, the issue of prejudgment interest in back pay awards is a matter within the discretion of the trial court. EEOC v. Wooster Brush Co. Employees Relief Ass'n, 727 F.2d 566, 579 (6th Cir. 1984); Bricklayers Pension Fund v. Taiariol, 671 F.2d 988 (6th Cir. 1982). In the Sixth Circuit, the calculation of the proper rate of interest is also a matter for the discretion of the trial judge. See Wooster Brush Co., 727 F.2d at 579. Absent an abuse of discretion, an award of prejudgment interest should stand. Id. It is not uncommon for courts to award prejudgment interest at rates above the

statutory rate. Several courts, for example, recently have fashioned interest awards which are tied to the prime rate. See id.; EEOC v. Pacific Press Publishing Ass'n, 482 F.Supp. 1291 (N.D. Cal. 1979); Richardson v. Restaurant Marketing Associates, 527 F.Supp. 690 (N.D. Cal. 1981).

Based upon the foregoing considerations, the Court finds that plaintiff is entitled to and should receive the previously ordered back pay award with prejudgment interest calculated at the market rate. As counsel for both parties have agreed as to the amount of interest to be awarded if the market rate is selected, the Court finds that the sum of $20,251.00 accurately reflects the accrued interest on the plaintiff's net pay.

The second issue before the Court is

whether or not the plaintiff's increased tax liability should be considered as a component of the claimant's back pay award. Plaintiff submits that as a result of the defendant's discriminatory actions she will receive in one year a lump sum of $282,909.00 representing her gross pay plus interest on her net pay at the market interest rate. The plaintiff maintains that this lump sum figure, which represents nearly nine (9) years of wages, will be taxed at a much higher rate than if she had received her wages on an annual basis. Plaintiff further contends that, in order to be made whole, she is entitled to a back pay award which compensates her for this increased tax liability.

Defendant, on the other hand, argues that the Court should not consider the tax implications and should merely award the plaintiff her gross back pay plus

interest. The defendant maintains that the plaintiff may reduce any increased tax liability by taking advantage of the income averaging provisions contained in the tax code. See I.R.C. §1301. The plaintiff concedes that the use of income averaging is an appropriate method of dealing with her increased tax liability, but merely questions its availability to her at the time in which she actually receives the back pay award. Plaintiff maintains that she should not be placed in a position which would force her to bear a financial burden which she would not have been liable for absent discrimination.

The purpose of Title VII is to make victims of unlawful discrimination whole. To that end, Congress has given the courts wide discretion in fashioning remedies designed to restore injured persons to the position they would have occupied but for

discrimination. Ford Motor Co. v. EEOC, 458 U.S. 219, 230 (1982); International Bhd. of Teamsters v. United States, 431 U.S. 324, 364 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975). It appears, however, both from the authority the parties have provided the Court and from the Court's own research, that the instant back pay issue is one that has not yet been addressed by the Court of Appeals for the Sixth Circuit. The Tenth Circuit Court of Appeals, however, recently has considered virtually identical arguments to those presently before this Court. While rulings of other circuits are not binding as precedents, the Court finds the reasoning utilized helpful to resolution of the instant matter.

The Tenth Circuit in Sears v. Atchison, Topeka & Santa Fe Ry., Nos. 82-2549 & 83-1726 (10th Cir. Dec. 10, 1984),

held that the trial court did not abuse its discretion by including a tax component in its back pay award. In Sears, the Court stated that a tax component may not be appropriate in an ordinary Title VII case, but that Sears presented an unusual situation due to the fact that class members in Sears were to receive seventeen (17) years of back pay in a lump sum payment. Living members of the class most likely would have been thrust into the highest tax bracket. In upholding the trial court, the Court pointed to two reasons why income averaging was an inadequate remedy in that case. First, income averaging is available for only the three years preceding the computation year. Second, income averaging is not available to estates of deceased taxpayers and nearly 40% of the class members in Sears had

died. Due to the special circumstances in the Sears case, the Tenth Circuit found that the trial court did not abuse its discretion by including a tax component it its back pay award.

In contrast to Sears, an earlier decision by the Tenth Circuit, Blim v. Western Elect. Co., 731 F.2d 1473 (10th Cir. 1980), cert. denied, 105 S.Ct. 233 (1984), held that the trial court had erred in awarding damages to the plaintiffs for increased tax liability resulting from the receipt of the back pay award in a lump sum payment. The Blim court declared that any significant tax penalty would be eliminated through the use of income averaging. Id. at 1480. Therefore, the trial court's award compensating the claimant for increased tax liability was held inappropriate.

Based upon the foregoing

considerations, the Court is persuaded by the reasoning in Blim. The special factors present in Sears do not appear to be present here. The Court therefore finds that plaintiff may eliminate any significant tax penalty resulting from the receipt of her back pay in a lump sum payment through the use of the income averaging provisions contained within the tax laws. See I.R.C. §§1301-05. Although the Court understands the plaintiff's concerns regarding the availability of income averaging in the year she actually receives her back pay award, the Court is not able to predict the future and must base its ruling on what the law is at this time.

The third issue to be resolved by this Court is the appropriate treatment for lost pension monies. It is stipulated

that had the plaintiff continued working for the defendant, her right to pension benefits would not have vested until September, 1985, when she would have completed ten (10) years of service to the defendant. The defendant submits that the plaintiff is entitled to receive pension credits since her original hire date, but maintains that monetary damages are inappropriate because the plaintiff's right to a pension has not vested. The defendant further claims that to award the plaintiff monetary damages would put her in a better position than she would have occupied absent discrimination. Plaintiff argues that she is entitled to receive the value of the pension as damages. Relying principally on the case of Johnson v. Ryder Truck Lines, 30 Fair Empl. Prac. Cas. (BNA) 659 (W.D.N.C. Aug. 8, 1980), plaintiff asserts that the value of the

pension is ascertainable and that the proper method of assessing damages is the cost to the employer method.

As previously stated, back pay awards under Title VII are intended to make the injured party whole by placing the claimant in the position he would have occupied but for discrimination. Albemarle Paper Co., 422 U.S. at 419. In addition to wages, items such as salary increases, vacation pay, and pension benefits which the claimant would have received had there been no discrimination should also be included. Rasimus v. Michigan Dept. of Mental Health, 714 F.2d 614, 626 (6th Cir. 1983), cert. denied, 104 S.Ct. 712 (1984). It is the finding of this Court that the plaintiff is entitled to receive pension credit since her original hire date, but that she is not entitled to be awarded the dollar

value of the pension. Under the defendant's pension benefits plan, an employee who leaves the service of the defendant prior to the tenth anniversary of his employment has no vested right to pension benefits and is not entitled to receive the value of the pension. To award the plaintiff monetary damages in lieu of pension benefits would place the claimant in a better position than she would have been in had she remained in the employ of the defendant and would make the injured party more than whole. Although courts are given wide discretion in fashioning relief for victims of Title VII discrimination, Ford Motor Co., 458 U.S. at 230; International Bhd of Teamsters, 431 U.S. at 364, they must not make plaintiffs more than whole by compensating them for injuries which they did not suffer.

Counsel for both parties agree that health benefits are to be based upon the cost to the employer. Holden v. Owens-Illinois, Inc., C76-442 (N.D. Ohio Dec. 12, 1984) (Stipulation of the Parties). The parties have requested that the Court decide whether the per participant or the per employee basis is to be used in calculating the value of the plaintiff's lost health benefits. The Court finds that the per employee basis is the proper basis to use. Therefore, the Court finds that plaintiff is to be awarded $14,194.00 as health benefits.

THEREFORE, for the above stated reasons, good cause therefor appearing, it is

ORDERED that plaintiff shall have judgment against defendant Owens-Illinois, Inc. in the amount of $355,721.00 grossing

net pay with income averaging and market rate interest; and it is

FURTHER ORDERED that plaintiff shall be awarded pension credit since her original hire date; and it is

FURTHER ORDERED that plaintiff shall have judgment against defendant Owens-Illinois, Inc. in the amount of $14,194.00 as health benefits; and it is

FURTHER ORDERED the plaintiff shall, within twenty (20) days of the filing of this Memorandum and Order, serve on the defendant and file with the Court a proposed draft of final judgment embodying the Court's disposition of this cause. Plaintiff shall include in that draft the amount of back pay to which she is entitled and defendant is liable, as outlined in the Court's ruling. Defendant shall have ten (10) days following service of the draft and memorandum upon them to

respond to said draft if there is any disagreement as to its contents.

IT IS SO ORDERED.

/s/

Sr. United States District Judge

Toledo, Ohio.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

E. Marie Holden,

Plaintiff,

vs.

Owens-Illinois, Inc.,

Defendant.

Case No. C 76-442

MEMORANDUM AND JUDGMENT ORDER

[Filed April 24, 1985]

YOUNG, J:

The defendant has filed a motion to amend the Court's Order of March 29, 1985, in two respects. The plaintiff opposes the motion in one respect, but agrees that it is well-taken in the other respect.

The Court's Memorandum & Order filed March 29, 1985, decided the damage issues in this cause, and directed the plaintiff to prepare an order expressive of its findings. The plaintiff has drafted such

an order, but the defendant's motion in effect asks the Court to enter a somewhat different order.

The first matter in issue here between the parties arises out of what the defendant asserts, and the plaintiff denies, is an inconsistency between the Court's holding on page six (6) of the March 29, 1985, Memorandum, and the first paragraph of the Court's Order on page nine (9) thereof. In this matter, the defendant is correct. The Court's holding was that no tax component should be added to the award of back pay. Thus the amount stated on page nine (9) should be $282,909.00, rather than $355,721.00. In this respect, the Order of March 29, 1985, is incorrect, and should be amended.

The second matter in dispute is the amount of health benefits included in the Order of March 29, 1985. As to that, the

parties are in agreement that the amount of $14,194.00 set forth in the third paragraph on page nine (9) of the Order is not in accordance with the oral stipulation of the parties at the hearing on December 12, 1984. The correct amount is $5,257.00. The Order must be amended to reflect this change.

On July 25, 1984, this Court issued its Opinion and Order finding for the plaintiff and against the defendant on the issue of liability, which finding is hereby affirmed.

On December 12, 1984, the parties filed a stipulation resolving certain damages issues and setting forth their differences on certain other damage issues.

On March 29, 1985, this Court resolved by a Memorandum those unresolved damage issues, but, as set forth above,

the Order as entered did not correctly reflect the stipulations and the decision of this Court.

THEREFORE, for the reasons stated, good cause therefor appearing, it is

ORDERED, ADJUDGED, AND DECREED that this Court's Order of March 29, 1985, be, and it hereby is, amended by interlineation by changing the figure "$355,721.00" to "$282,909.00" in the fourth line on page nine (9) thereof, striking out the words "income averaging and" in the fifth line on page nine (9) thereof, - and changing the figure "$14,194.00" to "$5,257.00" in the eleventh line on page nine (9) thereof; and it is

FURTHER ORDERED, ADJUDGED, AND DECREED that the plaintiff recover, and is hereby awarded judgment against the defendant in the sum of Three Hundred

Seventy-two Thousand, Two Hundred Seventy-nine Dollars and Forty-five Cents ($372,279.45), together with interest thereon at the market rate from and after July 31, 1984, upon which execution may issue.

This sum is arrived at in the following manner:

(1) Back pay through July 31, 1984, of $262,658.00, together with interest thereon at the market rate in the sum of $20,251.00, in all the sum of $282,909.00.

(2) Stock Purchase Savings Plan $10,561.00.

(3) Health insurance based on cost per participant basis, $5,257.00.

(4) Life, accidental death and dismemberment and long-term disability, $9,784.00.

(5) Employers contribution to Social Security, $14,396.00.

(6) Attorney fees, $35,000.00.

(7) Litigation Expenses, $736.00.

(8) Employee benefit consultant, $3,192.45.

FURTHER, defendant is ORDERED to compute and pay plaintiff her salary which she would have earned from August 1, 1984, to the date of this judgment; and it is

FURTHER ORDERED that plaintiff receive pension credit from her original hire date; and it is

FURTHER ORDERED that plaintiff be reinstated to her former position or its equivalent.

Exceptions noted.

IT IS SO ORDERED.

/s/

Sr. United States District Judge

Toledo, Ohio

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

E. Marie Holden,

Plaintiff,

vs.

Owens-Illinois, Inc.,

Defendant.

Case No. C 76-442

MEMORANDUM AND ORDER
[Filed May 8, 1985]

YOUNG, J:

This cause is before the Court on its own motion sua sponte to correct a clerical mistake in its April 24, 1985, Order, pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.

In reviewing this Court's Memorandum and Judgment Order of April 24, 1985, the Court finds that it made a clerical error by inadvertently miscalculating the total judgment against the defendant. The Court's April Order states that the

plaintiff's total judgment against the defendant is the sum of Three Hundred Seventy-two Thousand, Two Hundred Seventy-nine Dollars and Forty-five Cents ($372,279.45). Upon re-adding the individual amounts awarded to plaintiff, the Court finds that the sum of $361,835.45 is the correct total amount of plaintiff's judgment. The Order of April 24, 1985, therefore, is incorrect and must be amended accordingly.

THEREFORE, for the reasons stated, good cause therefor appearing, it is

ORDERED, ADJUDGED, AND DECREED that this Court's Order of April 24, 1985, be, and it hereby is, amended by interlineation by changing the figure "Three Hundred Seventy-two Thousand, Two Hundred Seventy-nine Dollars and Forty-five Cents ($372,279.45)" found in the first full paragraph on page three (3) to

"Three Hundred Sixty-one Thousand, Eight Hundred Thirty-five Dollars and Forty-five Cents ($361,835.45)."

IT IS SO ORDERED.

/s/

Sr. United States District Judge

Toledo, Ohio.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

E. Marie Holden,

Plaintiff,

vs.

Owens-Illinois, Inc.,

Defendant.

Case No. C 76-442

O R D E R
[Filed August 8, 1985]

YOUNG, J:

This cause is before the Court upon the Sixth Circuit Court of Appeals' decision filed June 18, 1986, that the judgment of this Court in this case be reversed and remanded with instructions to dismiss plaintiff's complaint.

THEREFORE, for the above reasons, good cause therefor appearing, it is

ORDERED that this Court's order granting judgment for the plaintiff is reversed; and it is

FURTHER ORDERED that plaintiff's complaint is dismissed.

IT IS SO ORDERED.

/s/

Sr. United States District Judge

STATUTES, REGULATIONS, AND RULES INVOLVED

This case involves the following statutes, regulations and rules:

1. 42 U.S.C. §2000e-2(a), Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, which in pertinent part provides:

> It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; ...

(July 2, 1964, P.L. 88-352, Title VII, §703, 78 Stat. 255; March 24, 1972, P.L. 92-261, §8(a), (b), 86 Stat. 109.)

2. 42 U.S.C. §2000e-3(a), Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, which provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ..., because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(July 2, 1964, P.L. 88-352, Title VII, §704, 78 Stat. 257; Mar. 24, 1972, P.L. 92-261, §8(c), 86 Stat. 109.)

3. Executive Order 11246, (C.F.R. p.174 (1973 comp.)) which provides in pertinent part that:

> §202. ... [A]ll Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:
>
> "During the performance of this contract, the contractor agrees as follows:
>
> "(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are

> employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship."

(30 F.R. 12319, Sept. 28, 1965; 30 F.R. 12935, Oct. 12, 1965, as amended by E.O. 11375. 32 F.R. 14304, Oct. 17, 1967, and E.O. 12086 (Oct. 5, 1978).

4. 41 C.F.R. §60-1.32 (1985), which provides in pertinent part that:

> The sanctions and penalties contained in Subpart D of the order may be exercised by the Director against any prime contractor, subcontractor or applicant who fails to take all necessary steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the adminis-

tration of the order or any other Federal, State, or local laws requiring equal employment opportunity.

(44 F.R. 77002, Dec. 28, 1979.)

5. 41 C.F.R. §60-2.22, which provides in pertinent part that:

> (a) An executive of the contractor should be appointed as director or manager of company equal opportunity programs. Depending upon the size and geographical alignment of the company, this may be his or her sole responsibility. He or she should be given the necessary top management support and staffing to execute the assignment. His or her identity should appear on all internal and external communications on the company's equal opportunity programs. His or her responsibilities should include, but not necessarily be limited to:
>
> > (1) Developing policy statements, affirmative action programs, internal and external communication techniques.
> >
> > (2) Assisting in the identification of problem areas.

(3) Assisting line management in arriving at solutions to problems.

(4) Designing and implementing audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's goals and objectives have been attained.

(5) Serve as liaison between the contractor and enforcement agencies.

(6) Serve as liaison between the contractor and minority organizations, women's organizations and community action groups concerned with employment opportunities of minorities and women.

(7) Keep management informed of latest developments in the entire equal opportunity area.

(b) Line responsibilities should include, but not be limited to the following:

(1) Assistance in the identification of problem areas

and establishment of local and unit goals and objectives.

(2) Active involvement with local minority organizations, women's organizations, community action groups and community service programs.

(3) Periodic audit of training programs, hiring and promotion patterns to remove impediments to the attainment of goals and objectives.

(4) Regular discussions with local managers, supervisors, and employees to be certain the contractor's policies are being followed.

(5) Review of the qualifications of all employees to ensure that minorities and women are given full opportunities for transfers and promotions.

(6) Career counseling for all employees.

(7) Periodic audit to insure that each location is in compliance in areas such as:

(i) Posters are properly displayed.

(ii) All facilities, including company housing, which the contractor maintains for the use and benefit of its employees, are in fact desegregated, both in policy and use. If the contractor provides facilities such as dormitories, locker rooms and rest rooms, they must be comparable for both sexes.

(iii) Minority and female employees are afforded a full opportunity and are encouraged to participate in all company sponsored educational, training, recreational, and social activities.

(8) Supervisors should be made to understand that their work performance is being evaluated on the basis of their equal emploment opportunity efforts and results, as well as other criteria.

(9) It shall be a responsibility of supervisors to take actions to prevent harassment of employees placed through affirmative action efforts.

[43 FR 49249, Oct. 30, 1978; 43 FR 51401, Nov. 3, 1978]

6. Rule 52(a) of the Federal Rules of Civil Procedure, which provides, in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon,.... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.... It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court....

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 28, 1983, eff. Aug. 1, 1983; April 29, 1985, eff. Aug. 1, 1985)

Supreme Court, U.S.
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No. 86-645

In The
Supreme Court of the United States
October Term, 1986

E. MARIE HOLDEN,

Petitioner,

v.

OWENS-ILLINOIS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT OWENS-ILLINOIS, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Does there exist any inter-circuit conflict with respect to the narrow issue raised in this appeal, i.e., whether Section 704(a) protects "opposition" to practices voluntarily undertaken by Federal contractors pursuant to Executive Order No. 11246 and government "affirmative action" regulations promulgated thereunder?

2. Should an employee, claiming discharge for "opposition" to practices governed by Executive Order No. 11246 and government regulations, be "protected" from discharge by Section 704(a) of Title VII?

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No. 86-645

In The

Supreme Court of the United States

October Term, 1986

E. MARIE HOLDEN,

Petitioner,

v.

OWENS-ILLINOIS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT OWENS-ILLINOIS, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, Owens-Illinois, Inc. ("Owens"),* prays that the Writ of Certiorari sought by petitioner, E. Marie Holden ("Ms. Holden"), be denied because the Sixth Circuit correctly held *as a matter of law* that Owens discharged petitioner for statutorily "unprotected" activity.

* Owens-Illinois, Inc. has listed in the Appendix hereto its subsidiaries, other than wholly-owned subsidiaries, and affiliates, as required by this Court's Rule 28.1.

STATEMENT OF THE CASE

A. Proceedings Below

This case involves, for purposes of the instant review, a single issue: whether petitioner was discharged because she opposed practices by her employer *made unlawful by Title VII.* Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a) ("opposition clause").[1]

In its decision on liability entered July 25, 1984, the district court made *no specific findings* either identifying any Owens' practices (actual or perceived) which were made unlawful by Title VII that were opposed by petitioner or connecting causally her discharge and any protected opposition activity. On the other hand, the district court did make specific findings as to petitioner's unsatisfactory behavior: "her zeal to do the work she was employed to do tended to make [her] more rigid and unyielding in her demands than she perhaps should have been" (Petitioner's Appendix—Pet. App. 26a-27a); "with more

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[1] This statute reads in relevant part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed *any practice made an unlawful employment practice by this title*" (Emphasis added).

Employer unlawful employment practices are specified in 42 U.S.C. § 2000e-2(a); and, if a court finds an employer has intentionally engaged in such unlawful practices because of race, color, religion, sex, or national origin, but *not for any reason other than Title VII prohibited discrimination,* the court may grant equitable relief. 42 U.S.C. § 2000e-5(g).

The "remedy phase" decisions of the district court, included at Pet. App. 20a-53a, were not considered by the court of appeals (*see* Pet. App. at 5a) and, therefore, should not be reviewed by this court.

zeal than good judgment, [she] moved aggressively to get action" (Pet. App. 32a); against supervisory instructions, she cancelled a scheduled plant management-community leaders meeting and failed to return home in time to confer with her supervisor before he went out of town (Pet. App. 30a); and she sought an immediate meeting in his absence with her supervisor's superiors to clarify the Company's "commitment" to affirmative action (*Id.*). Finally, notwithstanding the finding that petitioner's difficulties arose almost exclusively from the trip to Shreveport "to set up an affirmative action program" (Pet. App. 28a), the district court made several conclusory findings as to *its opinion* of certain Owens' practices which were not the subject of any opposition by petitioner, and which were not supported by any evidence of record (Pet. App. 31a-32a).

On appeal, Owens made essentially two arguments: first, the district court failed to make any *specific* findings to support its conclusion that petitioner had been discharged for opposing any Owens practices "made unlawful by [Title VII]"; and, even if petitioner was terminated because she aggressively and zealously sought to implement an affirmative action program which would comply with Executive Order No. 11246, her actions did not constitute "protected conduct."

Confronted with no specific findings of fact on the critical Section 704(a) "opposition" elements, the court of appeals examined the transcript, the record, and the district court opinion in search of a factual basis on which the district court might have decided petitioner's Section 704(a) claim, i.e., some opposition by petitioner to specific practices of Owens made unlawful by Title VII (Pet. App. 6a-7a). The appellate court, by reference to the district court opinion itself, concluded:

> "The district court held that Owens discharged plaintiff because she aggressively sought to do her job and that the discharge violated 42 U.S.C. § 2000e-3(a), the 'opposition clause'. . . . We hold that plaintiff's attempts to implement affirmative action plans which would comply with Executive Order No. 11246 do not qualify as protected activity under the opposition clause."

Pet. App. at 2a; *see also id.* at 8a. The basis of the court of appeals decision was that any alleged failure by Owens to implement its affirmative action plans did not and could not violate Title VII, a principle which this Court clearly articulated in *United Steelworkers of America v. Weber,* 443 U.S. 193, 204-08 (1979). Petitioner, as a matter of law, simply never engaged in opposition to conduct *made unlawful by Title VII.*

In addition to holding that the subject matter of petitioner's opposition was unprotected by Section 704(a), the court of appeals also held *as a matter of law* that, on the findings made by the district court and the record considered as a whole, petitioner "never proved, by a preponderance of the evidence, that the legitimate reasons that Owens offered for her termination were but a pretext for retaliation" (Pet. App. 17a). Accordingly, the Sixth Circuit reversed the district court's decision and remanded the case with instructions that petitioner's complaint be dismissed (Pet. App. 2a, 19a).

It is this decision of the court of appeals which petitioner, opposed by Owens, asks this Court to review on writ of certiorari.

B. Statement of the Facts

Ms. Holden was employed by Owens to be its Manager-Equal Opportunity Affirmative Action Programs (De-

fendant's Trial Exhibit—Def. Ex. O), a position she knew from her pre-employment interview was responsible solely for development and implementation of Executive Order No. 11246 affirmative action plans ("AAPs") which would comply with Revised Order No. 4, the regulation issued by the Federal contract compliance agency governing the form and contents of such AAPs (Trial Transcript—Tr. 73-74). Her direct supervisor, Mr. Anthony,[2] had advised her during her interview that he wanted an experienced person who was fully qualified to develop AAPs in compliance with the Executive Order program, not a "trainee" (Tr. 75-76, 588-89). Ms. Holden assured Mr. Anthony that she was familiar with the Executive Order and regulations and knew what she was doing (Tr. 75-76), even though she had intentionally misrepresented her experience and had falsified her employment history.[3]

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[2] Mr. Anthony was Manager, Equal Opportunity. He supervised Ms. Holden and another employee in a parallel position whose responsibilities were exclusively confined to the handling of EEO discrimination charges and complaints (Def. Ex. O; Tr. 86-87, 628-29). Mr. Anthony reported to Mr. Chadwell, a black male who was director of the department (Def. Ex. O; Tr. 585-86).

[3] Owens was approached by an employment agency on petitioner's behalf (Def. Ex. J) and interviewed her after she had completed a pre-employment application form (Def. Ex. M). She misrepresented her experience to Owens as having included Revised Order No. 4 AAP work. The amendments to Revised Order No. 4 initially requiring "utilization analyses" and "goals and timetables" were promulgated in 1972. See 41 C.F.R. § 60-2.32. From 1970 to 1973 Ms. Holden was a public information officer for the Massachusetts Commission Against Discrimination (MCAD), about which employment she never informed Owens and from which organization she was discharged, see n. 9, *infra;* was then unemployed for about a

(Continued on following page)

In order to understand the job Ms. Holden was employed to perform, this Court must focus on the requirements of an Executive Order No. 11246 affirmative action plan. For non-construction contractors, these requirements are established in Executive Order No. 11246, particularly Section 202(a), in 41 C.F.R. Part 60-1, and in 41 C.F.R. Part 60-2 ("Revised Order No. 4"), particularly the requirements for development of the technically complex "work force analyses," "job groupings," "utilization analyses," and "goals and timetables" specified in 41 C.F.R. §§ 60-2.11 and 60.2.12.[4] These are the essential

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year; and later worked during 1974-75 as a community affairs consultant for Supermarkets, Inc. (Tr. 16-20, 66-67, 71). She admitted that Supermarkets was not a Federal contractor and that she had never developed a Revised Order No. 4 AAP (Tr. 241-42). Notwithstanding the district court's "findings" to the contrary (Pet. App. 24a-25a), Ms. Holden was not qualified to perform the job for which Owens hired her, although the court of appeals did not address this question.

[4] In 41 C.F.R. § 60-2.11(a), the contractor is required to prepare a "work force analysis," i.e., distribution by race and sex of employees by job classification; next, it is required to categorize into "job groups" those classifications "having similar content, wage rates and opportunities," 41 C.F.R. § 60-2.11 (b); then it is required to perform *eight factor analysis* statistical comparisons between minority and female composition in the particular job groups with *relevant* internal or external (e.g., U.S. Census and other information) "availability" data to determine whether the business unit's work force either over-utilizes or *underutilizes* minorities or women, 41 C.F.R. § 60-2.11(b)(1) (minority utilization factors) and 60-2.11(b)(2) (female utilization factors). After compiling this information, the contractor is then required to adopt *voluntary* "goals and timetables" to correct its minority and female utilization deficiencies. It is important to note that the OFCCP regulations provide:

> "[I]n establishing the size of its goals and the length of its timetables, the contractor should consider the results which

(Continued on following page)

elements of an AAP without which a contractor is presumed by the U.S. Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP") to be in noncompliance status. *See* 41 C.F.R. § 60-1.40(a) and (b). The additional requirements of an AAP are set forth in 41 C.F.R. § 60-2.13.[5]

Prior to Ms. Holden's arrival in November of 1975, Owens had developed its own Procedure Manual describing in detail the content and format for its AAPs (Tr. 593 and Def. Ex. Y). Owens also had already developed and annually "critiqued" or updated AAPs for its headquarters and its *over 100* field units. (Tr. 591-93).[6] The "corporate headquarters AAP", moreover, had previously been determined by the responsible Federal enforcement agency to comply with the requirements of Revised Order No. 4 (Tr. 592; *see also* Plaintiff's Trial Ex-

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would reasonably be expected from its putting forth every good faith effort to make its overall affirmative action program work."

41 C.F.R. § 60-2.12(a); see *also* §§ 60-2.12(c) ("goals should be significant, measurable, and attainable"), 60-2.12(e) ("may not be rigid and inflexible *quotas* . . ., [rather] targets reasonably attainable . . ."), 60-2.12(f) (work force expansion, contraction, and turnover are to be considered), and 60-2.30 (goals are *not* to be used to "reverse discriminate").

[5] Although the district court took judicial notice of the Executive Order and OFCCP regulations (Tr. 21), the decision on liability completely ignored the Order and regulations, as well as the existence of any distinction between Title VII discrimination and voluntary Federal contractor affirmative action obligations.

[6] *See* 41 C.F.R. §§ 60-1.40(c) and 60-2.14. During a compliance review, the government regularly reviews the immediate past year's AAP against the current AAP to ascertain what utilization improvements were possible and were achieved. 41 C.F.R. §§ 60-1.20(a), 60-2.10, 60-2.12(a), 60-2.14 (Tr. 591-92; Def. Ex. AR through AZ).

hibit—Pl. Ex. 2); and, though subsequent to her discharge and due in no part to her efforts, the Shreveport plant AAP was also found by the government to be in compliance (Tr. 592; *see* Def. Ex. AY).

During her brief tenure, Ms. Holden was given only three specific work assignments: critiques[7] of the existing Bridgeton and Waco plant AAPs for compliance with Revised Order No. 4 (Tr. 593-95, 606) and development "from scratch" of an AAP for the Shreveport plant (Tr. 596). The latter assignment was required because, *as a new plant* (Tr. 496, 498), Shreveport did not have an AAP *yet;* and, under the applicable regulations, 41 C.F.R. § 60-1.40(c), one had to be developed *within 120 days* after startup.

Ms. Holden was unable to critique either the Bridgeton or Waco AAPs (Tr. 595-96, 606). More importantly, though, the *manner* in which she undertook development of the Shreveport plant AAP, i.e., in an adversarial fashion, acting like a "Federal compliance agent," rather than as a technical advisor to plant management, was what caused the difficulties between Ms. Holden and Owens (Tr. 432-33, 481, 490-91, 510-11, 599, 601-02).

All of Ms. Holden's problems at Shreveport involved differences of opinion about what information she needed and how fast the plant personnel should supply it so she could prepare the AAP. On her first day at the Shreveport plant, Ms. Holden had a plant tour, met the plant manager, went to lunch with a friend from another company, and spent the afternoon at the state employment service getting area labor force statistical data (Tr. 152-54,

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[7] Mr. Anthony described a "critique" as a section-by-section analysis of an existing AAP to determine whether its form and content met the requirements of Revised Order No. 4 (Tr. 595).

157-58, 292-93). The next two days she spent working at the plant, analyzing documents and other information on workforce composition and other employment related information supplied by the plant (Tr. 305-07). Ms. Holden thought she had not been given certain employee salary information, but the evidence and plant representatives' testimony reflect otherwise (Tr. 308-09, 424-26, 491-92; Pl. Ex. 13). Some of the information demanded by petitioner (*see* Def. Ex. S) could not be immediately or easily developed, the plant personnel director and his secretary explained (Tr. 424, 477-98). To assist Ms. Holden in the information compilation task, however, the plant hired and assigned to her a temporary employee (Tr. 431-33).

Ms. Holden called Mr. Anthony to say that the plant was not cooperating with her in terms of producing *immediately* some of the information she said she needed (Tr. 509-510, 599-600). Mr. Anthony advised her:

> "Well, that data could be sent to you after you get back. You know you don't have to insist on having it prepared right then and there . . . . [J]ust inform them what you want and then they would send it in [to Toledo]."

(*Id.*)[8] When petitioner's continuing demands created a stalemate, she was asked to return to Toledo (Tr. 510-11, 601-02).

After he informed her to return to Toledo, Mr. Anthony gave Ms. Holden two specific instructions: (1) pro-

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[8] Even government compliance officers do not demand *instant* production of information. *See, e.g.*, OFCCP Revised Order No. 14, 41 C.F.R. § 60-60.2(a) (30-day return deadline).

ceed to meet, as scheduled, that afternoon with the personnel director and various community leaders (Tr. 171-73, 603); and (2) return to Toledo the next day in time to meet with him because he would be out of town on the following two days (Tr. 173, 603-04). Ms. Holden did neither. She immediately cancelled the scheduled meeting with community leaders. Moreover, she intentionally delayed returning to Toledo until Mr. Anthony had left town (Tr. 172-76, 603). And, after she returned, petitioner wrote a memorandum to Mr. Anthony's superiors requesting *in his absence* an *immediate* meeting to clarify the Company's "EEO policy/affirmative action commitments" and to discuss her "Shreveport plant visitation" (Def. Ex. U).

When Ms. Holden's supervisor returned to Toledo, he chastised her for intentionally disregarding his instructions and for attempting to embarrass him in his absence by writing her memorandum to his superiors (Tr. 605-06). He advised her that he had serious doubts about her competence and gave her the Waco AAP to critique by the end of that workday (*Id.*). Ms. Holden, however, left the office soon thereafter and did not return (Tr. 341). She never completed the Waco AAP assignment and she failed to report for work the next day.

Her supervisor made several unsuccessful attempts to contact her by telephone at home the next day (Tr 606). He then prepared a memorandum to her specifying his concerns and promising to take appropriate action upon her return (*Id.*; Def. Ex. U). When he learned while at lunch

with his supervisor of Ms. Holden's earlier mistreatment of a black staff secretary,[9] Mr. Anthony decided simply to terminate her (*Id.; see also* Tr. 562). He wrote Ms. Holden's dismissal notice upon return from lunch and mailed it to her that day (Tr. 606-07; Def. Ex. V).

In her pretrial statements and testimony, Ms. Holden predicated her claim, not on Owens' allegedly discriminatory treatment of her personally or any other specific individual, but rather on what she *perceived* to be a lack of commitment by Owens as to its affirmative action obligations. Contrary to her pre- and post-employment instructions, Ms. Holden admitted that she intended to act like a "compliance officer," rather than someone whose job it was to assist managers to develop and update their AAPs to comply with Revised Order No. 4 and the Company's AAP Procedure Manual (Tr. 278-79).

Ms. Holden was discharged because of her disagreements with Owens as to how the Company's AAPs should be developed and implemented, as well as the adversarial manner in which she had gone about her affirmative action

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[9] The district court, Owens argued on appeal, improperly excluded the evidence on the secretary incident and refused to consider any evidence concerning the *reasons* for Ms. Holden's termination by MCAD, both indications Owens contended of petitioner's reluctance to accept supervisory direction and tendency to abuse staff personnel (Tr. 341-88, 574-80; deposition of Sharon Savage and Def. Ex. D, E, and I as Offer of Proof). *See also Holden v. Commission Against Discrimination of the Commonwealth of Massachusetts*, 671 F.2d 30 (1st Cir.), *cert. denied* 459 U.S. 843 (1982), affirming the district court decision sustaining her MCAD discharge for, among other things, behaviorial characteristics similar to those she exhibited while employed by Owens. The court of appeals never addressed this evidentiary issue.

manager's job (Tr. 601-06; Def. Ex. U and V). The district court clearly so found, i.e., she went to Shreveport "to set up an affirmative action program" (Pet. App. 28a) and her aggressive and overzealous behavior was addressed exclusively to that objective (Pet. App. 28a-32a).

Notwithstanding its specific findings that *petitioner's* "opposition" and related behavior was solely addressed to affirmative action subject matter, the district court also made several *conclusory* findings which were neither the subject of any specific opposition by petitioner, nor supported by any evidence in the record:

> ". . . [Owens'] employment practices were in many respects discriminatory, especially as to race, but also as to gender. It had been following the common practice of window dressing by token employment of minority individuals, rather than seriously trying to change its methods and to remedy the results of its past discriminatory actions."

(Pet. App. 31a-32a). Aside from the workforce composition of petitioner's own department (75% black) and evidence contained in the two AAPs—"corporate headquarters" and Shreveport plant, both of which were found to be in compliance with Executive Order No. 11246—the record contained *no evidence* on the basis of which the district court could make such conclusory findings. But, most important, the foregoing observations were those of the district court, not petitioner; and those "findings" were not subject matter about which she raised any specific opposition, nor were they the "opposition" activity causally connected with her discharge.

The record and district court findings simply show no opposition on petitioner's part to any practices by Owens

which either were or even arguably could have been perceived to be Title VII violations (Pet. App. 24a, 28a-32a). Hence, the court of appeals was correct *as a matter of law* in its conclusion, on the record and findings of fact, that petitioner had engaged in no Section 704(a) protected opposition and that she had failed to prove that her termination was a pretext for retaliation (Pet. App. 2a, 8a, 16a-17a).

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REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The Sixth Circuit held that the district court failed to make any specific findings with respect to what practices Owens had engaged in, and that Petitioner had opposed, which were unlawful under Title VII. It could locate no evidence in the record from which the district court could have made any such findings. Therefore, it held that Ms. Holden's "opposition" related to subject matter, i.e., the company's lack of commitment to affirmative action under Executive Order No. 11246 and applicable regulations and her desire to act as a "compliance officer," which was unprotected by Section 704(a) of Title VII.

This appellate court decision is *not* in conflict or inconsistent with any of the authorities upon which petitioner relies. In fact, it is completely consistent with decisions of the Fifth and Ninth Circuits involving EEO specialists whose opposition activities "disabled" them from performing the jobs for which they had been hired.

Likewise, this case raises no issue of national importance which would justify *judicial* expansion of the

scope of Section 704(a); and, contrary to petitioner's assertion, to protect activities such as Ms. Holden's would adversely effect, not enhance, OFCCP's accomplishment of Executive Order No. 11246's legitimate objectives by inhibiting the ability of employers to establish voluntary AAPs in the manner they, not their EEO specialists, determine to be appropriate.

Finally, the court of appeals made no *de novo* findings of fact. It decided this case *as a matter of law* either on the findings made by the district court or, where such were lacking, on the record which permitted only one resolution of the factual issue.

ARGUMENT

I.

NO INTER-CIRCUIT CONFLICT EXISTS

A. The Decision of the Court of Appeals Does Not Conflict with Those of Other Circuits Concerning the Standard for Establishing a Section 704(a) Violation

Petitioner mistakenly argues (Petition—Pet. at 22) that the Sixth Circuit held that, in order to prevail in a Section 704(a) action, she had to prove an *actual* violation of Title VII, rather than a "reasonable belief" that some particular employer practice was unlawful under Title VII. That is not what the court of appeals held at all. Rather, the Sixth Circuit held:

> "Since Title VII does not require the adoption of affirmative action programs, to the extent that [pe-

> titioner] sought to implement an affirmative action plan which would comply with Executive Order No. 11,246, [she] was not opposing a practice that violated Title VII. Consequently, the District Court erred in treating [petitioner's] attempts to implement an affirmative action program which would comply with Executive Order No. 11,246 as protected conduct under the 'opposition clause'."

(Pet. App. 8a; *see also* Pet. App. 2a and 17a).

None of the decisions relied upon by petitioner are in conflict with the Court of Appeals' decision in this case. The Sixth Circuit simply held that a perceived violation of Title VII under an undisputed set of facts is protected by Section 704(a) only if those facts, if true, establish a Title VII violation. In this case, even if the conduct which petitioner "opposed" was true, that is, that Owens was not satisfying its affirmative action commitments, such conduct did not constitute a violation of Title VII. Petitioner could not, therefore, *as a matter of law,* establish opposition to conduct perceived to be a violation of Title VII.

Regardless of how particular appellate courts have phrased the "reasonable belief" standard, the same three elements are required to establish a *prima facie* case:

1. "opposition" to some specific conduct or practice of the employer which is a violation *of Title VII,* i.e., discriminatory on the basis of race, color, religion, sex, or national origin;
2. adverse action against the employee; and
3. a "causal connection" or "linkage" between the *protected* "opposition" and the adverse personnel action.

See, e.g., Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1136 (5th Cir. 1981) and *Love v. Re/Max of America, Inc.,* 738 F.2d 383, 385 (10th Cir. 1984). The district court acknowledged this standard (Pet. App. at 36a-37a), but then failed to render any findings with respect to what *specific* Title VII "protected" opposition was causally connected with petitioner's discharge.

In addition, however, petitioner's case differs substantially from all of the authorities she cited for at least three reasons.

First, her job circumstances differed substantially from those of the employees involved in the decisions on which she relies. Ms. Holden was employed as a technical adviser to Owens' management, responsible for making sure its AAPs complied particularly as to format and content with the requirements of Revised Order No. 4. *Compare Smith v. Singer Co.,* 650 F.2d 214, 217 (9th Cir. 1981), with authorities relied upon by petitioner, none of which involved an EEO specialist.[10] *See* Argument, *infra,* 19, 23-24.

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[10] *Payne v. McLemore's Wholesale & Retail Stores, supra* (laid off employee picketing, among others, his employer for failure to hire blacks in supervisory and white collar jobs); *Berg v. La Crosse Cooler Co.,* 612 F.2d 1041 (7th Cir. 1980) (personnel department clerk who differed politely with Personnel Director over Company's maternity benefit policy); *Rucker v. Higher Educational Aids Board,* 669 F.2d 1179 (7th Cir. 1982) (black supervisor who refused to "set up" white female for discharge and informed his black superior that he agreed with woman's sexual harassment and other discrimination claims); *Sisco v. J.S. Alberici Construction Co.,* 655 F.2d 146 (8th Cir. 1981) (white construction worker and union shop steward who claimed "reverse discrimination" in his layoff se-

(Continued on following page)

Second, Ms. Holden's "opposition" was to the Company's "commitment" to affirmative action. As this Court clearly held in *United Steelworkers of America v. Weber*, 443 U.S. 193, 204-08 (1979), development of voluntary affirmative action programs is *permitted*, but not *required*, by Title VII when Section 703(j) of that Act is taken into consideration. Furthermore, Revised Order No. 4 itself speaks not of illegality, but of "good faith effort" to improve the utilization of minorities and women, through the use of *realistic* and *voluntary* goals and timetables. 41 C.F.R. §§ 60-2.11 and 60-2.12. Finally, Revised Order No. 4 admonishes all Federal contractors that:

> "The purpose of a contractor's establishment and use of goals is to insure that it meets its affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin."

41 C.F.R. § 60-2.30. "Opposition" to how a company seeks to develop its AAPs or achieve its affirmative action goals is simply not protected subject matter because non-compliance with Revised Order No. 4, which is enforced through

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(Continued from previous page)

lection under AAP); *Sias v. City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978) (member of city agency seeking Mexican-American applicants who complained to Federal compliance agency about discriminatory hiring practices); *Gifford v. Atchison, Topeka & Santa Fe Railroad Co.*, 685 F.2d 1149 (9th Cir. 1982) ("relief" clerk who claimed discriminatory effect resulted from labor agreement expansion of geographic work area); *Love v. Re/Max of America, Inc., supra* (female executive who complained about pay discrimination against her); and *Parker v. Baltimore and Ohio Railroad Co.*, 652 F.2d 1012 (D.C. Cir. 1981) (white male employee complaining about reverse discrimination precluding *his* employment opportunities in favor of black beneficiaries of an AAP).

an entirely different legal framework, *see* 41 C.F.R. §§ 60-1.26, 60-1.28, and 41 C.F.R. Part 60-30, is *not* synonomous with *discrimination* "made unlawful by this subchapter [Title VII]." 42 U.S.C. § 2000e-3(a).

Third, Section 704(a) protects *expression of opinion*, not *conduct*. The *manner* in which Ms. Holden conducted herself was the ultimate, uncontradicted cause of her discharge. Her refusal to accept directions and adversarial approach to everything connected with her brief Owens' employment compares to that found unprotected in *Hochstadt v. Worchester Foundation for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976); *see also Monteiro v. Poole Silver Co.*, 615 F.2d 4, 7-8 (1st Cir. 1980) (opposition raised as a "smokescreen" for disregard of supervisory instruction is not activity protected by Section 704(a)).

Ms. Holden's evidence and the district court's findings were missing two essential elements of a *prima facie* Section 704(a) "opposition clause" case: opposition to protected subject matter and any causal connection between such protected opposition and her discharge. In addition, the court of appeals accepted the district court's findings of fact as to petitioner's "rigid and unyielding demands" and the district court's implicit acknowledgement that she had "engaged in numerous instances of unsatisfactory behavior," quoting from its findings on the post-Shreveport visit activities (Pet. App. 16a-17a). Where the facts justified Owens' termination of Ms. Holden if the subject matter of her opposition was unprotected, then she could not *as a matter of law* prove that such legitimate reasons for discharging her were a pretext for unlawful retaliation *(Id.)*. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *United States Postal Service*

Board of Governors v. Aikens, 460 U.S. 711 (1983). The conclusion reached by the court of appeals was correct, therefore, where its differences of opinion with the district court were *as a matter of law*, not fact.

B. The Court of Appeals' Interpretation of the Scope of Section 704(a) In This Case Was Appropriate and Consistent With the Only Decisions Involving Similar Subject Matter

The court of appeals, in deciding the instant case, analogized it properly to the only appellate court decisions involving similar subject matter. *Smith v. Singer Co., supra; Whatley v. Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1325 (5th Cir. 1980); *see also Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986). These cases hold that Section 704(a) grants equal opportunity officers or affirmative action specialists no special brand of protection. In fact, the Sixth Circuit noted that individuals in such jobs are distinguishable from other employees:

> "The position was unique in that it required the occupant to act *on behalf of* his employer in an area where normally action against the employer and on behalf of the employees is protected activity."

Pet. App. at 14a, quoting *Singer, supra*, at 217.

Owens, like Flagship International, was entitled to require a "commitment" from Ms. Holden to *its* affirmative action program interests, not her own. As the Fifth Circuit held in *Flagship:*

> "[I]t was her position as a representative of the company in EEO matters, not her methods, which created the conflict of interest."
>
> * * *
>
> "[S]ome conduct, even if sincere opposition to employment practices under Title VII, may be so disruptive or inappropriate as to fall outside the protection of § 704(a)."

793 F.2d at 725 n. 12 and 728. *Cf. Rosser v. Laborers' International Union,* 616 F.2d 221, 223 (5th Cir.) *cert. denied* 449 U.S. 886 (1980) (employee's "conduct . . . so interferes with the performance of his job that it renders him ineffective in the job for which he was employed").

Ms. Jones' opposition in *Flagship* was to Title VII subject matter; yet, because of her position with the company, it was unprotected by Section 704(a). In Ms. Holden's case her opposition was not even to Title VII subject matter, all the more reason why, in light of her AAP manager position, it should be held "unprotected" by Section 704(a). The Sixth Circuit, therefore, in reliance on *Singer* and *Whatley,* and based on the district court's own findings, properly concluded that petitioner's deviation from her unique fiduciary duty in favor of assuming a self-proclaimed compliance officer role "disabled" her from performing the job for which she had been employed. Such interpretation of Section 704(a), given the unique facts of this case, was consistent with applicable precedent and altogether appropriate.

II.

THIS CASE DOES NOT PRESENT IMPORTANT QUESTIONS CONCERNING THE SCOPE OF SECTION 704(a)

A. No Issue of National Importance Exists Which Necessitates Expansion of the Scope of Section 704(a) Because Relief is Already Provided for Under the Executive Order Program

While petitioner would like this Court to review her case, it involves no issue of national importance because of its unique facts. The authorities relied upon by Ms. Holden in Part II-A of her petition (Pet. at 31-36) do not justify issuance by this Court of a writ.[11]

When Congress enacted Title VII, it provided an anti-retaliation provision in Section 704(a) similar to provisions

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[11] Petitioner cites (Pet. 29-30) four cases for the proposition that Section 704(a) should encompass opposition such as Ms. Holden's. *Smith v. Singer Co., supra; Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346 (9th Cir. 1984); *Hicks v. ABT Assoc., Inc.*, 572 F.2d 960 (3d Cir. 1978); and *Sias v. City Demonstration Agency, supra*. None are apposite. *Wrighten, Hicks,* and *Sias* all involve employees, other than EEO specialists, complaints concerning *specific* employer practices claimed to violate Title VII. In *Wrighten,* hospital employment practices, i.e., staffing, were the Title VII subject matter to which complainant attributed the inadequate black patient care. *Singer* is discussed, *supra*. Petitioner's reliance (Pet. 30 and n. 23) on appellate court recognition of Section 704(a) protection of opposition in the parallel 42 U.S.C. § 1981 context is simply inapplicable. Non-compliance with voluntary affirmative action obligations is not synonomous with or analogous to discrimination prohibited by Title VII.

included in other employment laws.[12] This Court, however, has cautioned against attempts to use activity "protected" in one statutory context to accomplish objectives "unprotected" in another. *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 70-73 (1975). Section 704(a) of Title VII should not be expanded to protect opposition to a company's commitment to affirmative action.

It is, furthermore, unnecessary for this Court to expand *judicially* the scope of Section 704(a) beyond "opposition" to practices which are made violative of Title VII because the Executive Order Program provides its own anti-retaliation protection. Specifically, 41 C.F.R. § 60-1.32 already provides that the OFCCP Director in appropriate circumstances can institute enforcement proceedings against any employer:

> " . . . [W]ho fails to take all necessary steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with . . . any other activity related to the administration of the order . . ."

See also 41 C.F.R. § 60-1.24 (Executive Order Program Complaint Procedure).

The *Weber* distinction between discrimination prohibition and affirmative action compliance should, therefore, be preserved; and, absent amendment *by Congress,* the scope of Section 704(a) should not be *judicially broadened* to in-

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[12] *E.g.,* Section 8(a)(4) of the National Labor Relations Act, 29 U.S.C. § 158(a)(4); Section 15(a)(3) of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) and Section 11 of the Occupational Safety and Health Act, 29 U.S.C. § 660. Petitioner has so recognized (Pet. at 32 n. 24). Each of these statutes' anti-retaliation provisions protect opposition with respect to *that statute's* subject matter.

clude "opposition" to a company's affirmative action practices.

B. Expansion of Section 704(a) To Provide "Absolute Immunity" For Affirmative Action Program Fiduciaries Will Itself Adversely Effect, Not Enhance, Achievement of Executive Order No. 11246 Objectives

Pressure is already exerted by government compliance officers upon the nation's employers to satisfy the requirements of Executive Order No. 11246 and Revised Order No. 4. *See* 41 C.F.R. §§ 60-1.26 to 60-1.33; *see also* 41 C.F.R. Part 60-30.

Satisfaction of the requirements of Revised Order No. 4, particularly the annual revision of "utilization analyses," 41 C.F.R. § 60-2.11, and the preparation on the basis thereof of "goals and timetables", 41 C.F.R. § 60-2.12, is technical and complex. It is, therefore, necessary for employers to hire affirmative action specialists whose interests are consistent with those of the company. These individuals, as distinct from other employees, simply cannot be licensed to act as adversaries of management.

The Ninth Circuit said it well when, declining to apply Section 704(a) to protect an affirmative action specialist, it noted:

> "The question is whether, under § 2000e-3(a), it is protected activity for this executive employee, occupying this position of responsibility, to take such action against the company he represents in support not of his own rights but of the perceived rights of those with whom it is his duty to deal on behalf of the company. *If § 2000e-3(a) gives him the right to make himself an adversary of the company, then so long as he does not give nonprivileged cause for dismissal he is forever*

> *immune from discharge. Section 2000e-3(a) so construed renders wholly unworkable the program of voluntary compliance which appellant was employed to conduct.* It was the same public interest in equal employment opportunities that brought forth both Title VII and the executive orders and regulations in question. Surely there must be room for them to operate harmoniously."

Smith v. Singer Co., supra, at 217 (emphasis added).

Just as Mr. Smith betrayed his employer surreptitiously, Ms. Holden "disabled" herself with Owens' management by seeking to enforce her own affirmative action demands instead of acting "on behalf of" the Shreveport plant consistent with her supervisor's instructions to develop and audit AAPs which would ensure that the company satisfied Revised Order No. 4. Ms. Holden simply created a "conflict of interest" between herself and Owens to the extent that she became ineffective in the job for which she had been employed. *Jones v. Flagship International* and *Rosser v. Laborers' International Union, supra.*

What petitioner seeks in this writ is transformation by this Court of Section 704(a) from a *shield* against retaliation for opposition to conduct violative of Title VII into a *sword* for use within a Company to achieve personal affirmative action goals inconsistent with company-established procedures and beyond those specified by the Federal regulations. OFCCP does not need a private attorney general within each company to accomplish the Executive Order's objectives and Section 704(a) should not be misapplied in a way which will surely disrupt the ability of employers to pursue voluntary affirmative action compliance and goals in the manner they, not their EEO specialists, deem most appropriate.

III.

THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN PULLMAN-STANDARD V. SWINT

In *Pullman-Standard v. Swint*, 456 U.S. 273, 287-93 (1982), this Court criticized an appellate court's practice of holding itself bound under Rule 52(a) by "subsidiary facts" found by the trial court, but not by findings as to "ultimate facts." This Court went on to hold:

> "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. . . . This Rule does not apply to conclusions of law. The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis."

Id. at 287. Moreover, the Court held:

> "[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course *unless the record permits only one resolution of the factual issue.*"

Id. at 292 (emphasis added).

In the instant case the court of appeals did not make *de novo* findings of fact. It accepted the district court's *specific* findings regarding the *subject matter* and *manner* of Ms. Holden's opposition activities. However, it noted that the district court did not make any specific findings of fact as required by Rule 52(a) with respect to *any specific practices of Owens* which *petitioner opposed* that she *perceived* to be "made unlawful *by Title VII*" (Pet. App. at 6a). The court of appeals then examined the transcript, the record, and the district court's opinion in search of any facts suggesting petitioner's "opposi-

tion'' was addressed to Title VII, rather than affirmative action, subject matter; and it found *none*.

Based upon the findings which the district court made and the absence of any record evidence of opposition to Title VII subject matter, the court of appeals properly concluded—''the record permit[ting] only one resolution of the factual issue,'' 456 U.S. at 292—that the district court had erred *as a matter of law* by granting petitioner relief with respect to opposition addressing subject matter ''unprotected'' by Section 704(a).

CONCLUSION

For the foregoing reasons, a writ of certiorari should *not* issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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November 14, 1986

APPENDIX

Owens-Illinois, Inc., pursuant to Rule 28.1 of this Court, identifies the following as its subsidiaries, other than wholly-owned subsidiaries, and affiliates:

Advanced Graphics, Inc.
Milford, NH

Andover Controls Corporation
Andover, MA

HCRC Services, Inc.
Toledo, OH

HCRC Services of Illinois, Inc.
Toledo, OH

HCRC Services of South Carolina, Inc.
Toledo, OH

HCRC Services of Texas, Inc.
Toledo, OH

Prudent Supply, Inc.
Minneapolis, MN

Toledo Air Associates, Inc.
Toledo, OH

O-I/Schott Process Systems, Inc.
Vineland, NJ

Owens-Illinois de Puerto Rico
Puerto Rico

Societe Anonyme de Developpement du Verre de Table Mecanique
Belgium

Libbey St. Clair Inc.
Canada

Cristal Owens Plasticos Ltd.
Chile

Cristaleria Peldar, S.A.
Colombia

Cristaleria del Ecuador, S.A.
Ecuador

Middle East Glass Mfg. Co.
Egypt

Emballages Laurent, S.A.
France

Papeteries d'Espaly, S.A.
France

Papeteries Etienne, S.A.
France

Hellenic-Owens Elefsis Glass Company, S.A.
Greece

P. T. Igar Jaya
Indonesia

P. T. Kangar Consolidated Industries
Indonesia

Nippon Electric Glass Company, Limited
Japan

Nippon Glass Kabushiki Kaisha
Japan

Sasaki-Owens Glass Co., Ltd.
Japan

Sun-Lily Co. Ltd.
Japan

Hankuk Electric Glass Co., Ltd.
Korea

Cajas Corrugadas de Mexico, S.A.
Mexico

Cajas y Empaques de Occidente, S.A.
Mexico

Envases de Borosilicato, S.A.
Mexico

Inmuebles Heda, S.A.
Mexico

Kraft, S.A.
Mexico

Union Glass & Container Corporation
Phillippines

Consol Limited
South Africa

U.S.I. Far East Corporation
Taiwan

Manufactuera de Vidrios Planos, C.A.
Venezuela

Supreme Court, U.S.
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No. 86-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

E. MARIE HOLDEN,

Petitioner,

—v.—

OWENS-ILLINOIS, INC.,

Respondent.

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION TO CERTIORARI

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Respondent.

==========

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION TO CERTIORARI

==========

Petitioner wishes to respond briefly to the arguments made by the Respondent.

1. The respondent argues that the Sixth Circuit's holding that a company is free to discharge an employee because of her efforts to obtain compliance by her employer with Executive Order No. 11246 does not present an important question. Petitioner, on the other hand, urges that the decision below necessarily will

seriously interfere with the ability of the federal government to enforce and ensure compliance with the Executive Order. Petitioner respectfully suggests that it would be appropriate and useful for the Court to request the Solicitor General to file a brief expressing the views of the United States on this question.

2. Much of the respondent's brief consists of an attempt to retry the facts of this case before this Court. Thus, it cites at length from the evidence it put on at trial relating to whether the Company had engaged in activities that violated Title VII. Its presentation ignores the fact that the district court found against it based on the totality of the evidence. [1] The attempt by respondent

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[1] See the Appendix to the Petition at pp. 31a - 32a; 39a.

to relitigate the case here is wholly inappropriate and inconsistent with Rule 52a.

Respectfully submitted,

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